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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON *and* TAKERU KAMIYAMA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Where the trial judge concurs with defendant that bench trial would be fairer than jury trial because of the depth of public hostility to defendant or the cause he represents, may trial by jury nonetheless be compelled for reasons demonstrably unrelated to achieving a fair result?

2. Do the Religion Clauses permit licensing a jury in a criminal case to substitute its lay views for the religious views of a church and its members as to how property and authority should be allocated within the church?

3. Does the Due Process Clause permit use of a criminal prosecution to pioneer a novel and debatable theory of federal tax liability?

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OPINIONS BELOW

This petition seeks review of a decision of a divided panel of the United States Court of Appeals for the Second Circuit, which is reported as *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983) (per Cardamone, J., and Winter, J.; Oakes, J., dissenting), and reprinted in the Appendix to the Petition for Certiorari, *infra* at App.1-74.[1] The underlying judgments of conviction in the United States District Court for the Southern District of New York (Goettel, J.), entered upon jury verdict, are unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit from which review is sought was entered on September 13, 1983. That decision affirmed, except with respect to one count against petitioner Kamiyama, judgments of conviction that were entered against petitioners Moon and Kamiyama in the United States District Court for the Southern District of New York, after jury trial, on July 16, 1982. Rehearings were denied on October 28, 1983, and November 1, 1983. By order dated November 22, 1983, Justice Marshall granted an extension of time in which to file a joint petition for certiorari to and including January 26, 1984. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

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1 Citations to the court of appeals opinions will be denoted "App. _____". Citations to the record as reprinted in the appendix submitted to the court of appeals will be denoted as follows: citations to pleadings and rulings, "A_____"; to pre-trial transcripts, "P_____"; to trial transcript, "T _____"; to post-trial transcript, "S_____"; to government exhibits, "GX _____"; and to defense exhibits, "DX_____".

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

AMENDMENT V

No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been comitted . . . .

STATEMENT OF THE CASE

Reverend Sun Myung Moon, the founder and leader of the Unification Church,[2] was convicted by a jury of filing false income tax returns—specifically, of failing to report as income the interest accrued on certain Chase Manhattan bank accounts openly held in his name, and the value of stock issued in his name in Tong Il Enterprises, a company run by members of his church.

Reverend Moon was also convicted, together with Takeru Kamiyama, a senior Unification Church member, of conspiracy to file false tax returns and to obstruct the tax investigation against Reverend Moon. Mr. Kamiyama was separately

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2 The international Unification Church movement arose in Korea over a quarter of a century ago as one of a host of revivalist Christian religions flourishing in the aftermath of the 40-year Japanese occupation, and now involves "more than 120 national Unification Churches throughout the world propagating a common religious message under [Reverend Moon's] spiritual guidance." *Holy Spirit Association for the Unification of World Christianity* [Unification Church] *v. Tax Commission*, 55 N.Y.2d 512, 519 (1982).

convicted of related substantive counts, one of which was reversed.[3]

At issue in this petition is not the facts the government purports to have established, but the process—including the choice of tribunal and the charge to the jury—by which the government obtained the result it sought. To set in context the violations of fairness and religious freedom claimed by petitioners requires only the following exposition of the record.

A. How the Government Obtained Trial by Jury.

Prior to trial, Reverend Moon asked to stand trial before the bench rather than a jury. He did so on the ground that public hostility to him and the Unification Church was so deep-seated and pervasive that bench trial would be fairer than trial before twelve representatives of the public. Mr. Kamiyama joined this motion.

The government refused consent. The prosecution argued that jury trial was necessary to "defuse the public criticism that had been leveled by Moon" in a speech he had made after his arraignment. App.7. In that speech, Reverend Moon had criticized the prosecution as motivated by religious bigotry and racism. *Id.* The prosecution claimed that, once that speech had been made, only jury trial—the "normal and preferable" mode of criminal trial—could project the "appearance . . . of a fair trial," while sparing the judge from being placed in an " 'untenable' position." *Id.*

The judge expressed doubts about the logic of the government's argument and about the ability of any voir dire to flush out biases as deep as those against Reverend Moon. P381. Nonetheless, he proceeded with voir dire, which lasted seven days.

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3 The jurisdiction of the district court was invoked under an indictment charging Reverend Moon with violation of 26 U.S.C. § 7206(1), Mr. Kamiyama with violations of 26 U.S.C. § 7206(2) and 18 U.S.C. §§ 1503, 1001, & 1623, and both defendants with conspiracy, 18 U.S.C. § 371, to violate 26 U.S.C. § 7206(1) and 18 U.S.C. §§ 1503, 1001, & 1623.

The jury selected was, as the judge recognized, "not totally free from bias." T1759.[4] Indeed, the judge stated after the jury selection that a bench trial would be "fairer" than trial before the jury selected. T1760-61. But he decided he had to acquiesce

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4 Answers given by jurors who later sat at trial were in fact laden with negative preconceptions about Reverend Moon and his church:

—*Mary K. Nimmo*, forelady, had heard that the Unification Church was a "cult," "making money on young people," and "wouldn't have wanted [her] children to have been a part of it." T473; *see also* T449, 477-80.

—*Esperanza Torres* knew of a "deprogramming" controversy involving a Unification Church member and concluded "that the parents [of the member] are right . . . ," doubted Reverend Moon was a genuine spiritual leader, T847-48, and considered the Unification Church a "cult" involving "mostly young people," T857. *See* T849, 852, 858, 862-63, 871, 873-75.

—*Rosa Spencer* did not "think" it proper for religious groups to invest in businesses, and felt it improper for religious groups to "solicit funds" publicly. T1349-50; *see also* T1358.

—*Doris Torres* had heard that "some people think [Moon] is a god," T1391, and that the Unification Church "brainwashes" people, T1394.

—*Claudette Ange* had heard that Moon "was brainwashing some teenagers" and "has children selling . . . things . . . to get the money to buy property." T1514-15.

—*Maria Abramson* had not heard of Moon, but thought that religious cults brainwash young people, T1588, and believed religious groups "should collect their money in the church," not in public. T1587-88.

—*Paul Shanley* had heard about deprogramming and young people being "brainwashed" and "used for selling things." T1650; *see* T1631-32, 1636.

—*Freddie Bryant* thought churches should raise funds by donations from their own members and not by "go[ing] into a complete business." T683-85.

—*Amerria Vasquez* had heard that the "Moonies" "indoctrinate the young people in the church," and "are taking over New York City." T2052.

—*Ernest Fetchko* had heard that the "Moonies" get members "by brainwashing them." T2106.

Thus, Reverend Moon's jury was truly a cross-section of the public—which, as reflected in a pre-voir dire opinion poll of 1,000 people, was over 76% negative in response to the very mention of the name "Reverend Moon," *see* A822. Indeed, almost 43% acknowledged that "[i]f [they] had the chance, [they'd] throw Reverend Sun Myung Moon *in jail*." A822-23 (emphasis added).

in the government's insistence on jury trial, T1761, because he thought that Reverend Moon's religion would not figure in the trial and thus that the jurors would be "by and large capable of putting aside the bias they have and deciding the case on the merits of the charges."[5] T1759.

B. How The Government Obtained Convictions By The Jury.

It was undisputed that the critical question at trial was who beneficially owned the Chase Manhattan bank accounts and the Tong Il stock: the Unification Church, or Reverend Moon himself.[6] Reverend Moon claimed that the church was the owner of the assets, for whose benefit he held and administered them; the government claimed these assets belonged to Reverend Moon personally. Contrary to the trial judge's prediction that nothing about Reverend Moon's religion would figure in the trial, the conflict between these two claims could not be properly resolved *without* consideration of Reverend Moon's religious relationship with his followers. For Reverend Moon's claim, quite simply, was that he had been given the assets *as* a religious leader, *by* his religious followers, *for* their religion.[7]

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5 After trial, the judge reiterated "that this case would have been better tried without a jury, and if the discretion were solely mine, I would have given [defendants] a nonjury trial." S26.

6 The court of appeals majority called this issue "critical," App.6; the dissent called it not only " 'central,' " App.64, but "key," App.67, as had the trial judge in his instructions, *see* App.67 n.3.

7 As Judge Oakes explained in dissent:

> [T]his case did *not* involve a claim that an ordinary, lay taxpayer held certain assets in a private trust for the benefit of another. On the contrary, the taxpayer here was the founder and leader of a worldwide movement which, regardless of what the observer may think of its views or even its motives, is nevertheless on its face a religious one, the members of which regard the taxpayer as the embodiment of their faith.

App.64-65.

The government did not overtly dispute, as it could not, that Reverend Moon was the leader of a *bona fide* religion,[8] or that the assets had been given to him by followers of his religion, who did so intending that the assets be used for that religion.[9] It simply proceeded with a theory that ignored Reverend Moon's religious relationship to his followers: a theory that Reverend Moon's ownership of the assets could be proved merely by showing that the assets were in Reverend Moon's name and under his control,[10] and that the assets had been used for what the government deemed Reverend Moon's personal investments and expenditures.[11] This theory treated the intent and religious identity of the assets' donors as wholly irrelevant, and relegated Reverend Moon to the role of an "ordinary, high-ranking businessman," A1905; *see* S60, 125—the very image the government continuously conjured up before the jury.

To counteract this filtering of religion from the case by the government, the defense sought to show that the uses of the

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8 Reverend Moon's religion, "by any historical analogy, philosophical analysis, or judicial precedent . . . must be regarded as a bona fide religion." *Unification Church v. Immigration and Naturalization Service*, 547 F.Supp. 623, 628 (D.D.C. 1982).

9 As the court of appeals majority conceded, the only evidence at trial regarding donative intent was testimony by several church members that "they gave money to Moon, intending it as a donation to their church." App.23.

10 The defense never disputed the facts that the assets were in Reverend Moon's name and control, and that he had *legal* title to them; it simply argued that since a trustee, by definition, has legal title to and dominion and control over trust assets, such facts pointed as much to trusteeship as to beneficial ownership. *See* App. 64 (Oakes, J., dissenting).

11 But the only significant uses of the assets shown at trial, apart from direct transfers to church entities, *see, e.g.*, GX83, 85, 87, 88, were to assist in the purchase of real property titled in church entities, *see, e.g.*, T2865-66, 5922-23; to secure a loan to a church-related organization, *see* T2700-02; and to invest in businesses thought by church members to be good investments for the Unification Church's worldwide movement, *see, e.g.*, T5613-17, 5694-95. And *no* evidence showed that *any* use of the assets, even if for minor living expenses, conflicted with the religious aims of those who entrusted the assets to Reverend Moon.

assets which the government deemed non-religious in fact supported and advanced not Reverend Moon personally, but the aims and activities of the international Unification Church movement. The government had two responses. *First*, it insinuated that Reverend Moon had simply made up, after the fact, the explanation that the assets were owned by his church movement.[12] *Second*, it cut off defense efforts to show that uses which the government labeled merely "personal" or "business" in fact advanced the church. It did so by obtaining rulings of inadmissibility, *see, e.g.*, T5255-56, T5681, and issuing threats, echoed in warnings by the trial court, *see, e.g.*, T3042-45, 4818-20, 5256-57, 5759-60, that such evidence, if admitted, would "open the door" to the government's introduction of "negative things about the church," T5760. Nor were these threats idle, for when evidence about Reverend Moon's religion did "creep into the trial," App.43, the government made inflammatory use of it—for example, by arguing that church members' devotion to Reverend Moon signaled "mind control" that undermined church members' credibility on the stand. *See* T6184.

Caught between a government bent on portraying his religion as sinister when it could not excise it altogether from the case, and a jury predisposed to view Reverend Moon as a "charlatan" running a "cult" for his own profit, Reverend Moon was hardly free to present to the jury a full and accurate picture of his religious relationship to those who gave him the assets.[13] Nor was the defense that rested on that relationship—

12 Thus, the government told the jury that there was no such thing as the international Unification Church movement because, unlike other church entities, the "movement" was not incorporated, T6488-92; *see also* T5516-17, 5521, nor even listed in Reverend Moon's immigration papers, T6227, 6229—documents whose admission the court of appeals held a patent abuse of discretion, App.41-42, but deemed "harmless," App.42. And it told the jury that the movement could not have owned the assets because documents submitted to the IRS tracing some of the funds to particular church transactions had been backdated by Reverend Moon's aides, *see, e.g.*, T6193, 6205-18—even though the government never disputed that the assets came from church sources.

13 Post-trial the judge acknowledged that such a picture "would have been disastrous to [present] before a jury." S60.

namely, that Reverend Moon held the assets for the benefit of the international Unification Church movement and therefore was not their owner for tax purposes—properly put before the jury in the trial judge's instructions on beneficial ownership.

At the core of those instructions was a list of factors, each of which the jury was left free to give whatever weight it wished. *See* App.68 n.3.[14] This list submerged, among a host of factors requested by the government, *see* A1305-06, the defense proposition that assets placed by church members in a church leader's hands for church purposes belong to the church, *see* A1371-72. And, while the list included "the fact that the accounts were maintained under Reverend Moon's name," the instructions nowhere explained, as the defense requested, A1365-66, that to his followers Reverend Moon "personified" the church. Moreover, the list's first two factors—focusing on the "specific organizational structure[s]" of the church—invited the jury to find that the form in which the church chose to organize itself could alone be decisive of guilt.

Furthermore, instead of informing the jury that if those who gave the assets to Reverend Moon "intended [them] to be for the [i]nternational Unification Church movement," the assets could "be viewed as not . . . his but . . . the [m]ovement's," T6122-23, the instructions told the jury that there is no trust unless the donors, in placing the assets in Reverend Moon's hands, expessed a "clear and unambiguous" intent to place the assets in a trust, App.69 n.3. And, instead of informing the jury that "the fact that some of the funds were disbursed for Rev. Moon's benefit does not make the interest on the accounts income to him," A1372, *see also* A1423, the instructions directed the jury to find that "there is no trust if the person who receives the money is free to use it for his own benefit," App.69 n.3. Thus, the instructions permitted the jury to find that the assets belonged to Reverend Moon for tax purposes despite the donors' intent that he hold and use the assets for the church and have the freedom, customary for the clergy, to use a portion to meet his own needs.

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14 The instructions on the central issue of ownership are reprinted in full at App.67-69 n.3.

C. How the Court of Appeals Affirmed the Convictions.

The court of appeals recognized that the defense had raised "troubling issues of religious persecution." App.3. It nonetheless rejected all of defendants' principal claims. As to the bench trial issue, the court simply ignored the trial judge's concession that bench trial would have been "fairer" than the jury trial demanded by the prosecution, and upheld the judge's acquiescence in that demand on the basis that it neither "punish[ed]" Reverend Moon, App.8, nor caused defendants "manifest prejudice," App.10. As to the instructions on beneficial ownership, the court rejected out of hand defendants' argument that those instructions violated Religion Clause principles, declaring those principles flatly inapplicable to this case. *See* App.28-31. And, as to defendants' argument that the instructions on beneficial ownership invited the jury to convict on a theory conflicting with settled federal tax authority as well as with New York trust law, the majority—citing no federal precedent, and over the dissent of Judge Oakes, App.62-74—disagreed, finding the instructions wholly unobjectionable, App.22-28.

SUMMARY OF ARGUMENT

Certiorari should be granted because, in at least three related respects, the government and the courts below violated not only First Amendment principles, but also elementary notions of fairness and the rule of law:

First, as this Court stated clearly in *Singer v. United States*, 380 U.S. 24 (1965), our Constitution does not permit the prosecution to insist on jury trial where to do so is to increase the probability of conviction, regardless of guilt, by throwing the defendant to the tribunal most likely to vent its hostility upon him. Our Constitution requires, rather, that any presumption in favor of jury trial be overidden where, as the trial court found here, that mode is *not* the one most likely to yield a fair result. *See id.* at 36-37. No case presented to this Court since *Singer* has shown so starkly the peril to fair trial of a

government licensed to convert jury trial—the ancient and honorable shield for defendants from oppressive officialdom—into a sword to be wielded freely against the unpopular minority or the outspoken dissident.

Nor, *second*, has any recent case so demonstrated the danger to religious liberty of a jury licensed to disregard the decisions of a church and the desires of that church's members in favor of its own lay instincts about how authority and property within a church should be allocated. As both the majority and the dissenting members of this Court made clear in *Jones v. Wolf*, 443 U.S. 595 (1979), the Religion Clauses forbid any secular tribunal from so second-guessing the internal decisions of a religious community—a commandment the jury was plainly invited to transgress by the instructions given and approved here. Whatever legitimate authority Congress and the IRS enjoy to protect the federal fisc by fixing clear rules that tell churches in advance what steps will ensure their retention of beneficial ownership of assets they choose to entrust to their leaders, it is plain that such federal authority does *not* encompass power to deputize juries to decide questions of church ownership without deference to the beliefs of church members, or to infer guilt from the entirely lawful organizational choices churches might make.

Third, contrary to the most basic principles of due process forbidding the minting of new theories of criminality on the brow of a defendant threatened with imprisonment, *see James v. United States*, 366 U.S. 213 (1961), the courts below unleashed a jury, already hostile to defendants' novel religion, not simply to assess a civil tax deficiency, but retroactively to impose criminal punishment upon Reverend Moon based on a novel theory of taxability—a theory in conflict with settled authority and announced for the first time on the very occasion it was first invoked.

REASONS FOR GRANTING THE PETITION

I. DEFERENCE TO THE PROSECUTION'S DEMAND FOR JURY TRIAL WHEN BENCH TRIAL WOULD BE FAIRER ABDICATES THE JUDICIARY'S DUTY TO ASSURE FAIR TRIAL.

It cannot seriously be disputed that Reverend Moon, the founder and leader of a small, new and unpopular religious denomination, is the target of profound public hostility in this country. Not only is it inconceivable that any "disciple of . . . the Reverend Moon [could be found] serving as the official chaplain in any state legislature," *Marsh v. Chambers*, 103 S.Ct. 3330, 3351 (1983) (Stevens, J., dissenting); it is even the case that some state legislatures, prompted by popular fear and loathing of the "Moonies," have tried to block the practice of their faith through legislation this Court has not hesitated to strike down as transparently unconstitutional, *see Larson v. Valente*, 456 U.S. 228, 255 (1982). It was out of fear that this widespread hostility would infect any jury empaneled to hear his case that Reverend Moon sought to waive his constitutional right to trial by twelve representatives of the public. And, for just that reason, the trial judge believed that the bench trial Reverend Moon requested would have been fairer than the jury trial to which the government's veto forced him instead.

To be sure, this Court held in *Singer v. United States*, 380 U.S. 24 (1965), that a federal criminal defendant, in the *ordinary* case,[15] need not be granted a bench trial over the government's veto. But *Singer* also held out the explicit promise that such a veto could not bar bench trial in "circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Id.* at 37. Denial of bench trial in Reverend Moon's case renders that promise a "promise to the ear to be broken to the hope," *cf. Edwards v. California*, 314 U.S. 160,

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15 In *Singer*, the defendant sought bench trial merely to "shorten[ ] the trial." 380 U.S. at 25; *see id.* at 38.

186 (1941) (Jackson, J., concurring)—a broken promise that only review by this Court can restore. For in Reverend Moon's case, the reasons for seeking bench trial are indeed compelling—as they would be whenever popular hostility to the defendant, his cause, or his message[16] is so overwhelming that the trial judge himself concludes bench trial would be fairer.

The court of appeals found Reverend Moon's reasons for seeking bench trial uncompelling only because it thought the trial judge was obligated to accept any jury meeting the "manifest prejudice" test, App.10, that this Court has long set forth for juror bias in cases where defendants *demand* jury trial.[17] Thus, in the view of the court of appeals, there was no compelling reason to grant bench trial over the government's veto so long as defendants had not shown that the jurors selected were incapable of "set[ting] aside" their admitted bias. App. 10.[18]

To be sure, requiring such a showing where a defendant *demands* jury trial makes sense. For if a defendant could insist on being tried by "jurors . . . [who are] exempt from the general feelings prevalent in the society in which they live," *United States v. Dennis*, 183 F.2d 201, 226 (2d Cir. 1950) (L. Hand, J.), *aff'd.*, 341 U.S. 494 (1951), then any highly unpop-

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16 A Communist likewise might have had compelling reasons to prefer bench trial during the McCarthy era, as would a civil rights worker in the South during the era of the struggle to end segregation there, or a woman accused of witchcraft in old Salem. As the court below itself observed, "This case is not the first occasion when a controversial political or religious figure has been criminally prosecuted; and if history teaches us anything, plainly, it will not be the last." App.36.

17 This stringent test for juror bias is derived from such cases as *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961), and ultimately from another case in which the defendants feared juror bias against their religion (the Mormon faith) but did not seek bench trial, *Reynolds v. United States*, 98 U.S. 145, 155 (1878).

18 The trial judge applied this same test when he reluctantly proceeded with jury trial on the theory that the jury, although "not totally free from bias," was "by and large capable of putting aside the bias [it had]." T1759.

ular defendant could assure the dismissal of his case simply by *insisting* on jury trial. Prosecutions cannot thus be allowed to lapse routinely whenever a pristine jury cannot be found to try an unpopular defendant who demands the jury mode of trial.

There is simply no similar danger of the prosecution lapsing, however, where, as here, a defendant affirmatively seeks trial before a *federal judge* rather than before a jury that is admittedly biased, but less than "manifestly prejudiced." To require a defendant to meet the "manifest prejudice" test where he seeks to *waive* a jury trial therefore turns the purpose of that test on its head and impermissibly burdens his efforts to seek what is, for him, the fairest mode of trial.[19] Here, Reverend Moon sought only to follow the advice of the Second Circuit, which itself observed, in one notorious Smith Act case where no bench trial was requested, that the risk of public hostility—however unavoidable in a jury trial—can be avoided if a defendant seeks instead "to procure a trial by a judge alone." *United States v. Rosenberg*, 195 F.2d 583, 596 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

A far better test for granting bench trial over the government's objection is the one suggested by this Court in *Singer* and amply satisfied here. *Singer* rejected a claim of automatic right to a bench trial on the ground that the jury is the "tribunal which the Constitution regards as *most likely to produce a fair result*." 380 U.S. at 36 (emphasis added). But *Singer* nowhere suggested that this presumption is irrebuttable; on the contrary, *Singer* expressly deemed it rebuttable in "compelling" circumstances, *id.* at 37—especially where " 'passion, prejudice . . . [or] public feeling' . . . may render

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19 How a defendant who seeks to waive jury trial might ever go about showing "manifest prejudice" in all the *possible* jurors that an indefinitely extended voir dire or a change of venue might turn up surely strains the imagination. The government itself recognized the futility of any such effort when it facetiously defied the defense in this case to show that "in the whole Southern District of New York, there are not twelve people who will afford the defendants a [minimally] fair hearing of their case." A1036.

. . . unlikely an impartial trial by jury," *id.* Where, as here, the trial judge himself concurs with the defendants that bench trial would be *fairer* than jury trial because its outcome would be less vulnerable to rampant public hatred, then all the rebuttal *Singer* calls for is complete: as between the two modes, it is bench trial, not jury trial, which is "most likely to produce a fair result."

Unless the prosecution can show that the defendants and the trial judge are both wrong, and that in fact it is *jury* trial, not bench trial, that would be more likely to produce a fair result, acquiescence in the prosecution's preference for jury trial is a patent abdication to the executive branch of a core judicial function: namely, safeguarding the defendant's right to fair trial.[20] Here, the prosecution made no such showing. Indeed the justifications proffered by the government in this case for insisting on jury trial were, if viewed most charitably, irrelevant to the achievement of a fair result, and, if viewed any other way, constitutionally impermissible *per se*.

First, the prosecution said that jury trial was necessary to "defuse the public criticism that had been leveled by Moon." App.7. In aiming to silence speech critical of the government,[21]

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20 Such an abdication is of course impermissible under our Constitution. *See Irvin v. Dowd*, 366 U.S. at 721 (statute could not properly be read to "condition" upon the consent of the prosecutor the "duty of the judiciary" to take steps to ensure fair trial); *Commonwealth v. Wharton*, 435 A.2d 158, 168 (Pa. 1981) (opinion in support of affirmance) (prosecutor's absolute veto over defendant's request for nonjury trial would unconstitutionally "restrict the exercise by trial court judges of their constitutional authority to conduct a fair trial").

21 Withholding bench trial in response to Reverend Moon's public criticism silences such criticism by penalizing it or, at the very least, exacting a substantial price for its exercise. This violates the long-settled doctrine that, even where one is not independently entitled to a benefit, such a benefit may not be conditioned on the sacrifice of a First Amendment liberty. *See, e.g., Regan v. Taxation with Representation*, 103 S.Ct. 1997, 2000 (1983); *id.* at 2004 (Blackmun, J., concurring); *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

and so to protect the government's reputation,[22] this proffered justification could not have more flagrantly violated the First Amendment. And even if subjecting Reverend Moon to jury trial did constitute the government's "answer" to his public outcry against bigotry and prejudice—albeit more in the spirit of censorship than of debate—it at best served extrinsic purposes wholly unrelated to assuring the "fair result" contemplated in *Singer*.

Second, the government claimed that, by so "defusing" Reverend Moon's speech, forcing him to jury trial would protect some public interest in the "appearance" of fairness. App.7. But even if the constitutionality of advancing this interest at the expense of fairness were not dubious,[23] and even if the interest could plausibly be served by projecting an image of a government that denies defendants trial by the tribunal both they and the judge think would be more fair, this interest is likewise wholly extrinsic to the fair *result* that is our Constitution's concern.

Third, the government claimed that jury trial was necessary to protect the trial judge from blame or criticism. App.7.[24] But

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22 Because speech critical of the government is at the center of First Amendment values, *see Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *Bridges v. California*, 314 U.S. 252 (1941), the government can claim no legitimate interest in protecting its reputation against such criticism, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964).

23 The government is without constitutional authority to increase the risk of serious injury to an innocent individual simply to make a point. *See Carey v. Population Services International*, 431 U.S. 678, 714-16 (1977) (Stevens, J., concurring). In any event, the public has no independent reason to prefer jury trial over bench trial as it does to prefer, for example, the fair appearance of open trial over the suspected unfairness of closed trial, *see Press Enterprise v. Superior Court*, 52 U.S.L.W. 4113, 4115 (U.S. Jan. 17, 1984). Indeed, this Court has stated that "it could hardly be seriously argued that a member of the public could demand a jury trial [over defendant's jury waiver] because of the societal interest in that mode of factfinding." *See Gannett Co. v. DePasquale*, 443 U.S. 368, 384 (1979).

24 In making this and the preceding claim, the government was evidently worried that, if it gave in to bench trial, the public would cry

this claim too is at once constitutionally dubious,[25] extrinsic to the fairness of the result, and completely irrelevant in a case where, as here, the judge was himself wholly willing to conduct a bench trial and indeed believed it the fairer mode.[26]

And *fourth*, the government claimed that jury trial is the "normal and preferable mode" of factfinding in criminal cases, App.7, simply begging the very question *Singer* left open: namely, whether jury trial, however "normal," is impermissible to force on a defendant when demonstrably less fair than bench trial.[27] This case answers that question, for the *normal* reasons for preferring jury trial are wholly absent where, as here, defendant is deeply despised by the populace for reasons far beyond the crime with which he is charged. The jury, as a representative voice of the people, is hardly a bulwark of protection for the accused, *cf. Duncan v. Louisiana*, 391 U.S. 145 (1968), when it is precisely oppression at

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"whitewash" if the judge acquitted, and the defendants would cry "persecution" if he did not. Whatever is the case elsewhere in the world, our legal system has long been proudly impervious to such cries, responding to public suspicions that justice will not be done by opening the proceedings to public view, not by relaxing the safeguards against unfair results.

25 Just as the interest of any public official in protecting himself from public criticism can never outweigh a newspaper's right to print, *cf.* note 22 *supra*, it surely can never outweigh a defendant's right to a fair trial: "No right ranks higher than the right of the accused to a fair trial," *Press Enterprise*, 52 U.S.L.W. at 4115.

26 The trial judge in this case, moreover, expressly disclaimed any personal sensitivity to public criticism or "blame," noting that "the framers . . . took that into account 200 years ago" when they gave federal judges life tenure. P371. *Cf. Craig v. Harney*, 331 U.S. 367, 376 (1947) ("judges are supposed to be men of fortitude, able to thrive in a hardy climate" of public criticism).

27 If jury trial were in fact the "transcending" mode the government read this Court's opinion in *Patton v. United States*, 281 U.S. 276, 296-98 (1930), to deem it, *see* A811, the result in that case, which held jury waiver permissible, would have gone the other way.

the hands of the people—through thinly veiled vigilanteism—that the defendant reasonably fears.[28]

II. LICENSING JURORS TO SUBSTITUTE THEIR LAY ALLOCATION OF CHURCH PROPERTY AND AUTHORITY FOR THAT OF THE CHURCH VIOLATES THE RELIGION CLAUSES.

The court of appeals was unanimous in recognizing that guilt or innocence in this case turned centrally on the question of who beneficially owned the funds and stocks placed by church members in Reverend Moon's hands—the Unification Church or Reverend Moon personally. *See* App.6, 64, 67.

It is beyond debate that, if this property question had arisen in the context of a dispute within the church over the issue of beneficial ownership, it would have been unconstitutional for a court simply to substitute its lay views, or those of a jury, for both the "desires of the members" of the church[29] and "the decisions of the church government agreed upon by the members"[30] to repose church property in Reverend Moon's hands. Such *ad hoc* substitution of lay standards for religious would profoundly violate the axiom that only government neutrality and deference toward determinations internal to churches and their membership are consistent with the religious freedom and the church-state separation contemplated by the Religion

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28 Nor can a jury's capacity to reflect the average sentiments of the community—a capacity that is in some circumstances a jury's virtue—make a jury a "preferable" factfinder in a case where that very capacity is its vice: a case where the average sentiment of the community is implacable hatred of a defendant for leading a feared and detested new religion, *see* note 4 *supra*. "The jury may be an adequate reflector of the community's conscience, but that conscience is not and never has been very tolerant of dissent." Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 529 (1970).

29 *See Jones v. Wolf*, 443 U.S. 595, 597, 603-04 (1979) (such desires must be respected in resolving dispute over beneficial ownership of property acquired by "funds . . . contributed entirely by local church members").

30 *Id.* at 614 (Powell, J., dissenting).

Clauses.[31] Indeed, the core value underlying both the Free Exercise Clause and the Establishment Clause is that of facilitating spiritual volition by showing "no [government] partiality to any [religious] group" or view, but instead letting "each flourish [solely] according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). *Cf. Torcaso v. Watkins*, 367 U.S. 488, 490 (1961); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953).

The court of appeals, in approving instructions that gave the jury a veto over a church's organizational structures and property arrangements, *see* App.68 n.3, flatly rejected the relevance of this core Religion Clause value to this criminal trial. It held instead that the "doctrine" applicable to "the resolution of *intra*-church property disputes," App.31 (emphasis added), simply "has no application" to a case such as this: a case that pits the government against an *undivided* church. And, true enough, there was never any dispute here *among* church members that the property was given by religious followers to their religious leader to hold and use for purposes advancing their religion, and that the property had been so held and used.

But, contrary to the court's view, respect for the decisions of churches and their members as to the allocation of property and authority within a religious community is not less but *more* essential where all those members share the same view of the matter and it is the government that would substitute its view for theirs.[32] This is especially true in a criminal context, for

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31 This case presents no occasion to revisit the issues that divided the *Jones* Court: *neither* the majority nor the dissenting view expressed in *Jones* is compatible with the *ad hoc* lay-for-religious substitution upheld in this case.

32 One perverse corollary of the reading given by the court below to the intra-church property dispute cases is that a religious community *united* would enjoy far less protection from second-guessing by a secular tribunal than would a religious community *in schism*. Indeed, had a property dispute within the Unification Church resulted in a state court declaration that the property at issue belonged beneficially to the International Unification Church or to one of its arms and *not* to Reverend Moon personally, Reverend Moon could hardly have been convicted for failing to report the property as his own. Surely petitioners cannot be jailed because their church *avoided* any such schism.

"[i]f one could be sent to jail because a jury in a hostile environment found [the views held within one's] religion false, little indeed would be left of religious freedom." *United States v. Ballard*, 322 U.S. 78, 87 (1944). It is thus the gravest constitutional error for a jury to be given unbounded license to discount, penalize, or simply to disregard the desires of church members and the decisions of the church itself in a case where, as here, those desires and decisions are logically and legally relevant to guilt or innocence.

Precisely such license was conferred by the courts below in this case. While conceding that Unification Church members had given the assets to Reverend Moon "intending [them] as a donation to their Church," App.23—"establishing that a charitable *gift* had been made *to the Church*," App.25 (emphasis added)—the court of appeals majority held that the trial judge would nonetheless have been free to omit *all* reference, in his charge to the jury, to the defense claim that it was in trust for his church, not for himself, that Reverend Moon held the assets, App.25. The majority accordingly found no error in the instructions the trial court *did* give—despite the fact that, as Judge Oakes observed without contradiction, those instructions freed the jury "to find against Moon on the issue of beneficial ownership without even considering the crucial issue of donors' intent," App.70 (dissenting opinion), and despite the fact that those instructions similarly freed the jury to reject "the Unification Church's definition of what constitutes a religious use or purpose" for that church, App.30 (majority opinion).

In expressly holding the jury "not bound to accept" church members' views of what uses of the assets were "religious," App.30, the court of appeals effectively licensed the jury to reject church beliefs on religious matters. In doing so, the majority wholly mischaracterized the defense claim as one that "*any use* of these funds by Reverend Moon was for religious purposes," App.28. Reverend Moon has never made any such extravagant claim; he claims only that it violates the Religion Clauses for a jury, in distinguishing between religious and personal uses for the purpose of deciding who owns property

contributed by church members, to deem "personal" those uses of the property which church members themselves fully ratify as advancing their religious mission.

Moreover, the court of appeals, in upholding the trial judge's refusal to instruct the jury that "Moon personifies the church movement," App.30, approved instructions that contained no reference at all to Reverend Moon's religious ministry, much less his special role as founder and leader of the Unification Church. But instructions that so fully filtered out religion, right down to the boilerplate admonition that "considerations of . . . religion must have no part in your deliberations," T6538—especially after a trial in which the government never ceased depicting Reverend Moon as merely an "ordinary, high-ranking businessman"—encouraged the jury to see Reverend Moon as running, in the judge's words, nothing beyond a "Fagin-like operation" with "hundreds of people collecting money and turning it over to him," *see* T4878, rather than as someone in whose hands it would be natural for members of his faith to place assets they desired to donate to the faith,[33] and by whose name it would be natural for them to refer to such assets.[34] A court or jury that cannot constitutionally

33 Such practices did not originate with these petitioners. As the founder of the Methodist Church, John Wesley, noted in his *Journal* of May 9, 1739, his followers in England had insisted on making their religious contributions not the ministry's trustees or "feoffees," but to Wesley himself, on the ground that "such feoffees always would have it in their power to control [him] and if [he] preached not as they liked, to turn [him] out of the [meeting house he] had built."

34 Reverend Moon has always made but one claim about the relevance of his special religious status to this case: that his pre-eminent role in the church he "personifies" explains why donations to the church would logically be placed in his name, and why references to the funds and stock as "Reverend Moon's" need not be seen as evidence that he or others ever "regarded [him] as owning the assets personally." *Cf.* App. 18. He has never made the radical claim the majority below wrongly attributes to him: namely, that the church "can owe no taxes," that Reverend Moon is "indistinguishable" from the church, and that therefore Reverend Moon can owe no taxes either. *See* App.30. Quite to the contrary, Reverend Moon has freely conceded that the church may owe taxes on its investment income, and that he may owe taxes on income he receives from the church for personal

defrock a minister, *see Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), surely cannot be permitted, in a prosecution to which the minister's religious status is crucially relevant, simply to suppress that status as though it did not exist.

Finally, the trial judge's instructions, as approved by the court of appeals, invited the jury to draw adverse inferences from the way in which the international Unification Church chose to organize itself. For the jury was told that, in deciding "whether. . .the international Unification Church movement existed"—and thus could have been the beneficial owner of the assets—the jury "should consider" "whether the Movement had a specific organizational structure, written charter or constitution" and "the existence of other Unification Church corporate entities during the relevant time period," App.68 n.3—as well as considering the church's decision to have Reverend Moon personally, rather than any of those subordinate corporate entities, hold and "administer[ ]" the funds, *id.*[35] In short, the very existence of this international religious movement—and, *a fortiori*, the claim that this movement owned the assets—was to be deemed suspect if the jury thought it more suitable for church assets to be entrusted to one of the church's incorporated worldly branches than to the church's leader. Such "searching and therefore impermissible inquiry into church polity," *Serbian Orthodox Diocese*, 426 U.S. at 723, becomes particularly offensive when used, as it was here,

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consumption—taxes of the sort he in fact *did* pay, *see, e.g.*, GX590, 591, 597, 800; T3729-30, 3735, 3812-13, 4094, 4982-98; DXH. His only claim has been that, because the income at issue here was owned not by him but by the church—a claim turning wholly on the two *being* distinguishable—*he* owed no tax on that income.

35 Nor, contrary to the majority's view, App. 26, 31 n.5, was this instruction cured by the later instruction that a movement may beneficially own property even if *not* incorporated. For an instruction permitting the jury to penalize the accused because of his religion surely cannot be cured by another instruction adding the qualification that the jury may also acquit the accused *despite* his religion.

to displace the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government. . .," *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

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Properly instructed under the Religion Clauses, a jury would have been bound to defer to whatever decision had been made by church members as to where and how to repose property they intended for church benefit. The instructions instead invited the jury to exercise a lay veto of that religious decision. Such free-wheeling veto power is anathema to the Religion Clauses, for it permits a jury to convict on criteria by which church members could not have been guided in advance—on the basis of jurors' subjective approval or disapproval of the choices a religious community has made internally, permitting prosecution to "degenerate into religious persecution," *see United States v. Ballard*, 322 U.S. at 95 (Jackson, J., dissenting).[36] And such veto power is likewise anathema to due process, for a jury empowered to ignore "legally fixed standards," and to penalize defendants instead "based upon [the jury's] own notions of what the law should be," is a jury loosed to be "arbitrary and discriminatory" in violation of our most fundamental norms of fairness, *see Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).[37]

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36 To be sure, some may not be uncomfortable with setting so roving a commission at large. After all, as noted above, note 4 *supra*, almost half of the 1,000 people polled prior to voir dire said that, "[i]f [they] had the chance, [they'd] throw Reverend Sun Myung Moon in jail." *See* A822-23.

37 If a *per se* rule, neutral and mild enough to survive First Amendment scrutiny, had been promulgated in advance by Congress or the IRS making the funds in this case taxable to Reverend Moon—say, by making legal title automatically dispositive of beneficial ownership absent formal trust instruments—the ability of church members to plan their conduct in accord with their religious wishes would arguably have reconciled such a rule with the Religion Clause value of respecting volition and the due process value of the rule of law. But not even the government here claims the pre-existence of any such fixed *per se* rule, *see, e.g.*, A1305-06, 1309, 1310. Thus this case, unlike *Jones v. Wolf*, necessarily "involve[s] a claim that retroactive [and *ad hoc*] application of [a jury's lay preferences] infringes free-exercise rights," *see* 443 U.S. at 606 n.4.

III. A CRIMINAL CONVICTION BASED ON A NOVEL AND DEBATABLE THEORY OF FEDERAL TAX LIABILITY VIOLATES DUE PROCESS.

The court of appeals majority gave full approval to instructions permitting a finding that, for federal tax purposes, funds placed in a religious leader's hands by members of his church as "a charitable *gift*. . .to the Church", *see* App.25, belong to the leader and not to the church, so long as the members, in making that "gift," failed to "clear[ly] and unequivocal[ly]" express an intent "to create a *trust*," App.23 (emphasis added), *or* the leader, in receiving that gift, was "free to use" even a portion for his own personal benefit, App.28, *cf.* App.73. In so doing, the majority upheld the convictions in this case on a wholly novel theory of federal tax liability: a theory that, far from being settled at the time the taxpayer acted, not only rests on a reading of underlying New York state trust principles so uncertain as to be ground for dissent within the panel, but squarely conflicts with all relevant federal tax precedents.

Indeed, prior to the decision in this case, federal courts considering the taxability of property in the hands of an individual for a charitable or similar purpose have universally recognized that, while use of a portion of the property for the recipient's personal purposes may make *that portion* taxable as his income,[38] the remainder—so long as held idle or used for the intended purpose—is not taxable to him. Nor is any of the interest earned on those idle funds taxable to him.

Court decisions involving the transfer and holding of funds in a wide variety of factual settings—including such contexts as transfers intended to benefit another individual,[39] a legal en-

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38 If the donors intended that the recipient be free to use a portion for his personal benefit, the portion so used may, however, be a non-taxable gift. *See* Internal Revenue Code § 102; *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

39 *E.g.*, *Brittingham v. Commissioner*, 57 T.C.91, 100-01 (1971), *acq.*, 1971-2 C.B. 2.

tity,[40] or simply a "cause," such as a charity[41], political campaign[42] or religious work[43]—reflect this rule. So do published IRS determinations,[44] which the IRS expressly encourages taxpayers to follow in preparing their returns, *see* Revenue Procedure 78-24, 1978-2 C.B. 503,505. Given the donors' intent, expressed or implied, that the transferred funds be used for a charitable or similar purpose, in none of these authorities has the result ever turned—as the courts below made it turn here—on whether the donors "mentioned the word 'trust' " or otherwise displayed a "clear and unequivocal" intent to "create a trust,"[45] or on the recipient's freedom to make personal use

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40 *E.g.*, *Herbert v. Commissioner*, 377 F.2d 65 (9th Cir 1967); *cf. Broussard v. Commissioner*, 16 T.C. 23 (1951).

41 *Cf. Pierce Estates Inc. v. Commissioner*, 3 T.C. 875, 893-94 (1944) *acq.*, 1944 C.B. 22 (trust for medical treatment of the poor and needy).

42 *E.g.*, *O'Dwyer v. Commissioner*, 266 F.2d 575, 585-86 (4th Cir.), *cert. denied*, 361 U.S. 862 (1959) (political campaign); *Stratton v. Commissioner*, 54 T.C. 255, 282 (1970), *acq. in relevant part*, 1970-2 C.B. xxi (political campaign); *Seven-Up Co. v. Commissioner*, 14 T.C. 965 (1950), *acq* , 1950-2 C.B. 4 (conduit for advertising fund).

43 *Cf. Winn v. Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979) (fund for missionary work); *Morey v. Riddell*, 205 F.Supp. 918, 921 (S.D. Cal. 1962) (contribution to informally organized church).

44 *See*, *e.g.*, Revenue Ruling 74-23, 1974-1 C.B. 17 (interest earned on idle campaign funds held by a candidate is reportable only as income earned in a fiduciary capacity, rather than as personal income of the candidate); Revenue Procedure 68-19, 1968-1 C.B. 810, 811.

45 Indeed, when the recipient of funds is one who has held himself out as the representative of a cause, not even direct evidence of the donors' intent to benefit that cause has previously been deemed necessary. Rather, federal tax law has always *presumed*, absent evidence to the contrary, that a donor making a gratuitous transfer to the representative of a cause intends to benefit the cause. *United States v. Scott*, 660 F.2d 1145, 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). *See also* Revenue Procedure 68-19, *supra* note 44 ("The Service will *presume* in the absence of evidence to the contrary that contributions to a political candidate are political funds which are not intended for the unrestricted personal use of such a recipient" (emphasis added)).

of some portion of the property donated. On the contrary, the rule has consistently been applied regardless of whether the donation establishes a "trust", an "agency," or even an unlabeled fiduciary relationship[46]—and even where the recipient is expected to make personal use of a portion of the property.[47] Had the settled rule been applied in this case, none of the Chase interest—all of which was earned on funds donated "to the church," and earned, of course, while those funds were idle—would have been taxable income to Reverend Moon.

Nor, prior to the majority's decision in this case, was there any clear, certain rule under New York law deviating from the rule settled by the federal tax authorities. Indeed, the majority cited no direct authority for its view that, in New York, evidence of intent to make a charitable donation to a cause is insufficient to permit a finding of charitable trust[48]; and it ignored closely analogous New York authority, cited by Judge Oakes, that intent to make a gift for "charitable or religious purposes" is in fact sufficient. *See* App.66; *see also* App.70-72. As demonstrated by Judge Oakes' forceful dissent, it is at best doubtful that the New York Court of Appeals would in fact agree with the majority's interpretation of New York law.[49]

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46 *Compare, e.g., Pierce Estates* (gift for charitable purposes created an informal oral trust) and *Brittingham* (recipient of funds held them as agent for transferror) *with Broussard* and *Herbert* (no characterization of relationship between holder of property and beneficial owners).

47 *E.g., Morey v. Riddell*, 205 F.Supp. at 921 (pastors received and held money as a donation to their church with the understanding that they would be free to use a portion for their personal support).

48 While the principle invoked by the majority—that intent "to create a trust" must be unequivocally expressed—has been applied by New York courts to decide whether a charitable trust was restricted to specific uses, *see* App.24, it has never been applied by *any* court to conclude that property donated for charitable purposes could be deemed to *belong* to the recipient.

49 Among other things, the majority's novel trust-law interpretation would perversely free faithless trustees—simply by persuading donors to avoid using the word "trust" or by making personal use of part of the assets entrusted to them—to divest the trust's beneficiaries of all claim to beneficial ownership of *any* of the trust assets.

But even if it were to do so, its ruling would break new ground in New York and would be inconsistent with the mainstream of federal tax authorities. And, unlike a diversity case or other civil suit in which federal courts might properly anticipate a previously unannounced state ruling, this is a *criminal* proceeding—a proceeding in which a novel interpretation may not be newly announced without running headlong into the prohibition of the Due Process Clause, which "mandate[s] that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited . . ." and forbids "punishment for actions that [were] not " 'plainly and unmistakably' proscribed." *Dunn v. United States*, 442 U.S. 100, 112 (1979).

That mandate was wholly ignored here. For the theory of taxability used to obtain conviction in this case was not "plainly and unmistakably" the law; indeed it was an entirely novel theory. And such a theory, announced for the first time on the very occasion on which it is first invoked—and departing sharply from the standards of prior cases—suffers from precisely the vice that may render a vague rule unconstitutional on its face. *Cf. Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-53 (1969). Like a rule that is written in an ink visible only to the prosecutor, judge, and jury, a newly announced theory of liability not only fails to give fair notice in advance of the conduct for which punishment will be imposed. It also fails to prevent the prosecutor from creating the "crime" to fit the accused, *see United States v. Evans*, 333 U.S. 483 (1948); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921)[50] —from engaging in *ad hoc*, arbitrary, and discriminatory prosecution and conviction, *see, e.g., Kolender v. Lawson*, 103 S.Ct. 1855, 1858-59 (1983); *Grayned v. City of Rockford*, 408

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50 *See Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("[T]he vice in [a vague criminal statute] cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute.' "); *Marks v. United States*, 430 U.S. 188, 191-92 (1977) (ban on applying novel standard of criminal liability in *ex post facto* manner must be enforced with "special care" whenever case "implicates first amendment values").

U.S. 104, 108-09 (1972).[51] And this Court has treated the risk of such discrimination as least tolerable when its victims might be religious minorities. *See, e.g., Kunz v. New York*, 340 U.S. 290, 295 (1951); *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940).[52]

Tax cases enjoy no immunity from these due process principles. Twenty-three years ago in *James v. United States*, 366 U.S. 213 (1961), five justices of this Court, in two separate opinions,[53] decided that, as a matter of law, a taxpayer may

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51 Nor can a conviction obtained on the basis of a novel rule be saved from a due process challenge simply on the ground that the government must prove, as an element of its case, that the defendant acted willfully. For while a defendant's subjective belief that he was committing a crime may be relevant to ensuring adequate notice, it is wholly irrelevant to the prevention of discriminatory prosecution. And, as the Court recently emphasized in *Kolender*, 103 S.Ct. at 1858-59, it is the prevention of discriminatory prosecution, regardless of the defendant's subjective intent—the prevention of a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections"—that is the central thrust of the void-for-vagueness doctrine.

52 As the trial judge himself observed post-trial, the investigation of Reverend Moon's taxes would have been less likely if he had been the leader of a less controversial religion. A536-57; *see* App. 35. This case thus illustrates that careful adherence to the requirements of precision and prospectivity would have served an important policy against selective prosecution, the soundness of which the Solicitor General has recently acknowledged: "[W]hen the decision to prosecute is based upon an impermissible criterion, such as race or religion or the exercise of constitutional rights, the general rule [of discretion] must yield to an exception." Brief for the United States at 10, *Hobby v. United States*, No. 82-2140, *cert. granted*, 52 U.S.L.W. 3460 (U.S. Dec. 13, 1983). To the extent that the ban on retroactive application of novel rules is used to police this exception preventively, courts and litigants will be relieved from the need to face the thorny factual issues that arise when, as in this case, defendants seek discovery and a hearing to explore *actual* prosecutorial motive in the context of a claim of selective prosecution. *See* App.33-37.

53 Chief Justice Warren, joined by Justices Brennan and Stewart, announcing the judgment of the Court, 366 U.S. at 220; Justice Black, joined by Justice Douglas, concurring in part, dissenting in part, *id.* at 224.

not be convicted on the basis of a new theory of taxability that was at best uncertain at the time the taxpayer acted.[54] Since then, three circuits, following *James'* lead, have declared their view that, while a "pioneering interpretation of tax liability" may be appropriate to impose in a *civil* tax proceeding, it may not be imposed in a *criminal* prosecution, "with attendant potential loss of freedom . . ." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (holding conviction for tax evasion barred "as a matter of law" where taxability "highly debatable," *id.* at 1162); *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (holding "[d]ue process," *id.* at 1427, precludes tax fraud convictions where legality of tax shelter program "was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment," *id.* at 1428); *see United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979) (en banc).[55] In reaching this conclusion, all three of these circuits recognized that, when the "obligation to pay is . . . problematical . . . , defendant's actual intent is irrelevant." *Critzer*, 498 F.2d at 1162; *Garber*, 607 F.2d at 98; *see Dahlstrom*, 713 F.2d at 1428.

The decision of the Second Circuit in this case, upholding the defendants' convictions on what must be recognized as "a pioneering interpretation of tax liability"—"novel and unsettled by clearly relevant precedent," *Garber*, 607 F.2d at 100—

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54 As Justice Black, anticipating the Court's reasoning in *Marks v. United States*, *supra* note 50, explained, "[e]ven though the *ex post facto* provision of the Constitution has not ordinarily been thought to apply to judicial legislation," the theory of taxability newly announced by the Court in *James* should not be made "applicable to past conduct" as a matter of "good, governmental policy." 366 U.S. at 224. And, in any event, "a criminal statute that is so ambiguous in scope that . . . [a new] interpretation of it brings about totally unexpected results . . . raises serious questions of unconstitutional vagueness." *Id.* at 224.

55 Although the holding in *Garber* was to remand for a new trial to correct the errors in excluding expert testimony on the "uncharted" area of tax law involved in that case, and in failing to instruct the jury that uncertainty of law was relevant to criminal intent, *id.*, at 99, in reaching that result the *en banc* majority firmly stated that where "the tax question was completely novel and unsettled by clearly relevant precedent . . . [a] criminal proceeding . . . is . . . inappropriate," *id.*, at 100.

plainly conflicts with the *James* line of cases.[56] Indeed, the Second Circuit's decision in this case is the *only* federal decision in the 23 years since *James* to affirm a criminal tax conviction over a dissent as to the underlying theory of taxability of the income in question.

Conclusion

The court of appeals correctly observed that "[t]his . . . is not the first occasion when a controversial political or religious figure has been criminally prosecuted." App.36. But it does appear to be the first in which such a figure has been forced to stand trial before a jury that he sought to waive so as to avoid pervasive prejudice against him as a political or religious figure. It is surely the first time a conviction by a jury has been affirmed despite the trial court's conclusion that a non-jury trial would have been fairer, and despite the appellate court's concession that a non-jury trial would have been permitted absent defendant's public protest at being singled out for

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56 Although the circuit court's opinion does not *explicitly* reject defendants' argument that, in light of the *James* line of cases, criminality cannot properly be found where the underlying theory of taxability has not been clearly established in advance, it must in fact be read to reject that argument as one of the supposedly "minor points [the court] consider[ed] wholly without merit," *see* App.4. For the colloquy at oral argument before the circuit court—in which Judge Oakes stated explicitly that the Second Circuit's decision in *United States v. Ingredient Technology*, 698 F.2d 88 (2d Cir.), *cert. denied*, 103 S.Ct. 3111 (1983), "rejects the *Garber* test of intent" grounded in *James*—made plain that the court entertained defendants' argument, but rejected it out of hand as foreclosed by *Ingredient Technology*. Transcript of Oral Argument, at 16-17 (2d Cir., Mar. 23, 1983).

Nor does this Court's denial of certiorari in *Ingredient Technology* foreclose the argument petitioners here advance. *First*, the decision in *Ingredient Technology* did not reject this argument, but merely found "no lack of clarity in the law" challenged there, 698 F.2d at 96 n.8. *Second*, the only ruling in *Garber* actually rejected by *Ingredient Technology* concerned an issue not relevent here: namely, the admissibility of expert testimony about the debated theory of taxability of the income in question.

This case, therefore, squarely presents for the first time the issue whether the retroactive application of a novel theory of taxability in a criminal case violates due process—a question that now divides the Second Circuit from at least the Fourth and Ninth, if not also the Fifth.

prosecution. If these petitioners go to jail, they will indeed be the first religious leaders since the ratification of the Constitution to be imprisoned because of the way they and their followers chose to organize their church's internal affairs—and the first defendants in a federal criminal tax prosecution in at least a quarter century whose convictions have been affirmed over a dissent as to the underlying theory of the income's taxability.

To permit such extraordinary results without plenary review by this Court would be troublesome even if it could safely be predicted that what befell these petitioners would not befall others. But such predictions are notoriously unsafe, and the court of appeals may well have been right in its prophesy that Reverend Moon's case "plainly . . . will not be the last" of its type, *id.* That, at least, must be the estimate of the many and diverse *amici*—friends not of these petitioners, surely, but of this Court and of religious and civil liberty—who join in urging review by the Court on the merits of this case.

For these and all the foregoing reasons, petitioners accordingly pray that a writ of certiorari issue so that such review may take place.

Respectfully submitted,

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January 26, 1984

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 755, 765, 766, 1153—August Term, 1982

Cal. No. 1630

(Argued March 23, 1983 Decided September 13, 1983)

Docket Nos. 82-1275, 82-1279, 82-1277,
82-1357, 82-1387

UNITED STATES OF AMERICA,

Appellee,

—v.—

SUN MYUNG MOON and TAKERU KAMIYAMA,

Defendants-Appellants.

Before:

OAKES, CARDAMONE and WINTER,

Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York (Goettel, J.)

convicting appellant Moon of conspiracy and filing false tax returns and appellant Kamiyama of aiding and abetting the filing of false returns, obstruction of justice, and perjury.

Affirmed in part, reversed in part.

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CARDAMONE, *Circuit Judge*:

Reverend Sun Myung Moon and Takeru Kamiyama appeal from judgments of conviction entered on July 16, 1982 in the United States District Court for the Southern District of New York following a six-week jury trial before Judge Gerard L. Goettel. Moon was charged basically with filing false income tax returns and Kamiyama with obstructing the investigation of those returns.

Paying income taxes is not America's most popular national pastime. But, most accept the certainty of taxes as part of the price of modern life. Tax fraud prosecutions usually do not present the myriad of constitutional problems involved here. Yet in this case the defense raises troubling issues of religious persecution and abridgment

of free speech that are interwoven with other grounds for objection to the judgments below. In reducing this huge record and the veritable avalanche of arguments presented to what we hope is comprehensible form, we have divided this opinion into five major sections—Denial of Bench Trial, Sufficiency of the Evidence, Jury Instructions, Miscellaneous Issues, and Kamiyama's Claims. Most of the issues raised have been addressed. Those not discussed are minor points that we consider wholly without merit.

We commend the manner in which Judge Goettel presided in this especially lengthy trial. Such errors as inevitably crept in were skillfully unearthed by counsel. Of course, defendants are only entitled to "a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619 (1953). Defendants did receive a fair trial and we affirm their convictions on all counts, except Kamiyama's conviction on Count Seven which is reversed.

BACKGROUND

The main indictment upon which Reverend Moon and Mr. Kamiyama were tried charged them in Count One with conspiracy, 18 U.S.C. § 371, to file false federal income tax returns, 26 U.S.C. § 7206(1), to obstruct justice, 18 U.S.C. § 1503, and to make false statements to government agencies, 18 U.S.C. § 1001, and to a federal grand jury, 18 U.S.C. § 1623. Counts Two, Three and Four charged Moon with filing false tax returns for 1973, 1974 and 1975, in violation of 26 U.S.C. § 7206(1). Counts Five and Six charged Kamiyama with aiding and abetting the filing of the false 1974 and 1975 returns, 26 U.S.C. § 7206(2). The remaining counts (Seven through Thirteen) charged Kamiyama with the substantive of-

fenses of obstruction of justice through the submission of false documents to the grand jury, 18 U.S.C. § 1503, submitting false documents to the Department of Justice, 18 U.S.C. § 1001, and five counts of perjury, 18 U.S.C. § 1623. A separate indictment charged Kamiyama with an additional count of perjury.

At the conclusion of the trial on May 18, 1982 the jury returned guilty verdicts against both defendants on all counts. Moon was sentenced to concurrent terms of 18 months in prison on Counts One through Four and fined $25,000 plus costs. Kamiyama was sentenced to concurrent terms of six months in prison on all counts of which he was convicted and fined $5,000. Both sentences have been stayed pending this appeal.

Defendants moved in September 1982 for a new trial, alleging juror misconduct. After holding hearings on this issue, Judge Goettel denied the motion by order dated October 13, 1982 and issued an order on November 5, 1982 restraining all parties and their agents from communicating with the trial jurors without prior consent of the court. Defendants appeal from these two post-trial orders as well as from their convictions.

The case focused principally on bank accounts held in Reverend Moon's name in the Park Avenue office of the Chase Manhattan Bank. On March 27, 1973 Reverend Moon walked into the Chase branch and opened a personal checking account and a savings account. During the next nearly three years over 1.7 million dollars was deposited in these accounts in Moon's name, all but $200,000 of which was in cash. A substantial portion of the funds were transfered to high-yielding Chase time deposits held in Moon's name. During the years 1973-1975 these investments earned more than $100,000 in interest, not reported as income on Moon's tax returns

for the years in question. Also at issue was $50,000 worth of stock issued to Moon in 1973 in Tong Il Enterprises, Inc., a corporation organized in New York in 1973 by Moon and Kamiyama which was engaged in the business of importing products from Korea. The receipt of this stock, which the government apparently views as a dividend, also was not reflected as income on Moon's tax return.

The critical issue is whether, as the government claims, Moon owned these assets and was therefore required to pay income taxes on the bank interest and the value of the stock or, as the defense urges, Moon held these assets merely beneficially or as a trustee for the Unification Church. Before entering upon a discussion of this central issue, we first address contentions raised by the defendants as a result of the government's refusal to consent to defendants' request for a bench trial.

I

DENIAL OF BENCH TRIAL

A. As a Denial of the First Amendment Right to Free Speech

It is the view of the defense that the government's reason for opposing the defendants' request for a bench trial is unconstitutional, so that the judge's acceptance of it was error of constitutional dimension mandating reversal. The factual background may be simply stated. At a rally in New York City's Foley Square on October 22, 1981 following his arraignment, Moon made a speech which was partially reprinted as a full page advertisement in the New York Times of November 5, 1981. He stated:

> I would not be standing here today if my skin were white or my religion were Presbyterian. I am here today only because my skin is yellow and my religion is Unification Church. The ugliest things in this beautiful country of America are religious bigotry and racism.

In response to defense efforts to waive a trial by jury, the prosecutor wrote a letter to Judge Goettel dated March 11, 1982 stating her opposition and, referring to the excerpt quoted above, adding that defendants had raised—and circulated worldwide—questions about "the integrity and motives of this prosecution." It was the prosecutor's conclusion that a single factfinder would be placed in an "untenable" position and that there was an overriding public interest in the appearance as well as the fact of a fair trial, which could be achieved only by a jury. The government insisted that employing this normal and preferable mode of disposing of fact issues in a criminal trial would defuse the public criticism that had been leveled by Moon.

The defense argues that, on the contrary, insistence upon a jury trial had the effect of punishing Moon for exercising his First Amendment right of free speech. The punishment, so the argument runs, took the form of denying Moon a benefit, i.e., a nonjury trial, that he would otherwise have been entitled to. The underlying rationale for this argument is that Moon and his followers had received such negative press that, regardless of the government's protestations, it was impossible to obtain a fair trial with a jury and that this state of affairs was only exacerbated by Moon's speech.

Trial by jury is a constitutional right provided in Article III Section 2 of the Constitution. The Sixth Amendment

guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Nothing in the Constitution guarantees one the right to select his own tribunal or the right to a speedy and public trial by a fair and impartial judge. The right to trial by jury is a benefit granted an accused, *see Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380 (1979), which a defendant has the power to waive. But before a waiver can be effective, the consent of the prosecutor and the sanction of the court must be obtained. *See Patton v. United States*, 281 U.S. 276, 312 (1930); Fed. R. Crim. P. 23(a). The ability to waive the benefit does not import a right to claim its opposite. And the Supreme Court has stated that because of "confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver." *Singer v. United States*, 380 U.S. 24, 37 (1965).

Conclusive as that statement might appear, it does not end the matter. For the Supreme Court has also held that even though one has no right to a government benefit, such benefit may not be denied and when granted may not be conditioned or later revoked for a reason that infringes an individual's constitutional rights, especially First Amendment freedoms. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). But the defendant has presented no facts on this record that convince us that the government's reason for refusing to consent to a bench trial was impermissibly to punish Moon for exercising his First Amendment rights. Instead, it appears that the public prosecutor elected, as was her right and based upon the

reasons she gave, to have this case tried in the constitutionally preferred manner. Without the factual predicate to support his argument, the defendant's claim of error evaporates.

B. As the Denial of the Right to a Fair Trial

Moon also contends that prior to the voir dire there was an unacceptable risk that a fair jury could not be selected and therefore that the denial of a bench trial violated his right to a fair trial.[1] This argument, like the previous one, urges that there was a reasonable likelihood in advance that public animosity toward Moon and his religion would prevent a fair trial. In our view this debatable contention could be satisfactorily resolved only upon the voir dire of prospective jurors. *See Application of Cohn*, 332 F.2d 976, 977 (2d Cir. 1964). Ordinarily, insisting that a defendant undergo a jury trial against his will does not run afoul of a defendant's right to due process and a fair trial. *Singer v. United States*, 380 U.S. at 34-36. Certainly we recognize, though, that there might be cases where the circumstances are so compelling that for the court to countenance the government's insistence on a jury trial over the defendant's request to be tried by a judge alone would deny the defendant a fair trial. *See Singer v. United States*, 380 U.S. at 37. This is not such a case. Compelling circumstances are not demonstrated simply by claims of an atmosphere poisoned by a negative

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1 Appellants also contend that the subject matter of this tax fraud prosecution, together with the sheer volume of complicated exhibits, turned this trial into one of mesmerizing complexity. We believe the case was not so complex as to be beyond the grasp of the jury. While the trial lasted over six weeks and there were hundreds of exhibits introduced, very few of them were complicated. The jury's task came down to deciding the basic issue of ownership of the Chase accounts and the Tong Il stock.

press. The validity of such claims is properly shown upon a voir dire of prospective jurors. The trial court, wisely recognizing that this was a safer avenue to follow in order to ascertain whether a fair jury could be obtained, properly reserved until after the voir dire its option to overrule the government's refusal to waive a jury trial.

Additionally, review of the transcript of the seven painstaking days of jury selection, involving the interrogation of 63 out of 200 veniremen for the panel and 17 for the six alternate positions, convinces us of the accuracy of the trial court's finding after selection was completed that "we have gotten a jury which is, if not totally free from bias, by and large capable of putting aside the bias they have and deciding the case on the merits of the charges." Jurors need not be totally ignorant of a defendant in order to be fair and unbiased. *See Dobbert v. Florida*, 432 U.S. 282, 302 (1977); *Murphy v. Florida*, 421 U.S. 794, 798-800 (1975). Even where a prospective juror has formed some preconceived opinion as to the guilt of the accused in the case on trial the juror is sufficiently impartial if he or she can set aside that opinion and render a verdict based on the evidence in the case. *Murphy v. Florida*, 421 U.S. at 799-800; *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961); *United States v. Murray*, 618 F.2d 892, 899 (2d Cir. 1980). Significantly, defense counsel only challenged one of the 12 jurors for cause, and the denial of that challenge is not raised on appeal. *See Beck v. Washington*, 369 U.S. 541, 557-58 (1962) (failure to challenge for cause prospective jurors is strong evidence defendant considered jurors not biased). Absent a clear abuse of the trial court's discretion, one that results in manifest prejudice to defendants, the finding made by the trial judge that the jury was fair and unbiased must be upheld. *See United States v. Brown*,

644 F.2d 101, 104 (2d Cir.), *cert. denied*, 454 U.S. 881 (1981).

II

SUFFICIENCY OF THE EVIDENCE

A. Counts Two Through Six

Defendants argue that the evidence presented was insufficient to find them guilty beyond a reasonable doubt on the substantive tax offenses charged in Counts Two through Six. To find defendants guilty of fraud in the filing of Moon's income tax returns, the jury had to find that statements contained in the returns which were verified as true were in fact false, and that these false statements were willfully made. Viewing the evidence in the light most favorable to the government and considering that all questions of credibility are within the exclusive province of the jury, there was ample evidence to find that Moon willfully filed false tax returns for the years 1973-75 and that Kamiyama willfully aided and abetted in the false 1974 and 1975 filings.

(1) Falsity

(a) Moon's Financial Picture

We examine first the evidence regarding falsity. In order to do so we sketch briefly defendants' financial picture. In November 1972 when Reverend Moon visited the United States he was already a successful businessman, being founder and chairman of the boards of eight publishing and manufacturing companies in his native Korea. The Unification Church of New York had begun purchasing and importing ginseng tea and marble vases

from some of Moon's Korean companies. In June 1973 Kamiyama incorporated Tong Il Enterprises in New York which purchased and sold these items. Moon subscribed to 500 shares for $50,000 which, according to some of the corporation's records, he paid for. His wife subscribed to 200 shares for $20,000 and Kamiyama subscribed to 100 shares for $10,000, all from an original issue of 1005 shares. Thus, Moon and his wife had 70 percent control of the company and Moon was elected chairman of its board. Although 500 shares were issued to Moon, he did not actually pay for them, as he had originally obligated himself to do. Instead the stock was issued to him without payment in 1973, apparently in exchange for various assets transferred to Tong Il by other corporations which Moon controlled. In the spring of 1974 Moon began drawing a salary from this enterprise as a "business consultant" and at the same time opened a checking account, known as the "household account," in the Chase Manhattan Bank into which his salary was deposited.

As noted, about a year earlier, Moon had opened a different personal checking account ("checking account") and an individual savings account at the Chase Manhattan Bank. Subsequently, on April 9, 1973, Moon personally deposited $100,000 into the checking account. During the three-year course of his relationship with the bank approximately $1,724,774 was deposited into Moon's various accounts. Commencing in late 1973 he transferred from the checking and savings accounts, and directly deposited, a substantial portion of the $1.7 million in high-yielding Chase time deposits. These time deposits were also held in Moon's name, and on his instructions they, together with the interest earned on them, were rolled-over. The total interest earned on all the

Chase accounts in the relevant years, 1973-75, was approximately $106,650.

With respect to living expenses, the household account at Chase was used by Moon primarily to pay the private school expenses of his children. Ordinary personal and household expenses were paid for by the Holy Spirit Association for Unification World Christianity (HSA-UWC), incorporated in California in 1961 as the American branch of the Unification Church.

Having outlined the Tong Il stock and Chase accounts transactions, we complete Moon's financial picture by describing the real estate dealings pertinent to this case. A month before Moon's November 1972 arrival in the United States HSA-UWC purchased "Belvedere," the 20 acre Bronfman estate in Tarrytown, New York, for $750,000. The seller took back a $550,000 mortgage and the $200,000 balance was paid by HSA-UWC. When Moon came in 1972 he occupied the main house on this estate. In the fall of 1973 an adjoining estate became available. It was purchased that October in the name of HSA-UWC for $631,827. To complete the purchase Moon loaned HSA-UWC $361,827 from the checking account at Chase. He also issued his personal check to Sotheby Park Bernet for $51,160 to pay for furnishings in the estate, which he named "East Garden." In late 1973 Moon's family came from Korea. He and his staff moved out of Belvedere and, together with his family, took up residence in East Garden.

(b) Evidence

Under the government's theory of the case, Moon failed to report interest income earned on the Chase Manhattan Bank accounts that he purportedly owned and income recognized as a result of a distribution of Tong Il

stock to him at no cost.[2] Appellants' principal contentions at trial were that the Chase accounts and Tong Il stock belonged to the Church, that Moon merely held these assets as the nominee, agent, and/or trustee of the Church, and that therefore he was not taxable on either the Chase interest or Tong Il stock distribution.

In concluding that the jury properly found the Chase accounts and Tong Il stock to be Moon's personal property, we start first with the fact that the Chase accounts and Tong Il securities were maintained in Moon's name and controlled by him. Second, some funds clearly destined for Church entities were put in existing Church bank accounts which were owned and controlled by church corporations. Third, from his handling of the Chase accounts and Tong Il stock Moon seemingly regarded them as his own, not as belonging to the Church. Fourth, high ranking members of the Church were told that the Chase funds belonged to "Father," not to the Church.

The government introduced evidence that Moon actually considered the Chase accounts to be his own property rather than the Church's, and that he used funds from the accounts for expenditures which the jury could have concluded were personal in nature. Several examples will suffice. In September 1975 Moon and Kamiyama purchased shares in a new bank, Diplomat National Bank in Washington, D.C., $80,000 worth of stock for Moon

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2 Since the defendant's only argument regarding the Tong Il stock is that it belonged to the Church rather than to Moon, it appears that he concedes the taxability of the distribution if in fact the stock belonged to Moon personally. The defendant did not assert below and does not assert now that the distribution constituted a gift to him from Tong Il, which gift of course would not be subject to the federal income tax. The jury could well have found that the whole transaction amounted to an indirect dividend to Moon from the companies under his control which transferred assets to Tong Il.

and $75,000 for Kamiyama. The funds used to pay for the stock were derived from one of Moon's time deposits at Chase and transferred into the household account, and later a check drawn on that account was made payable to the Diplomat National Bank.

In 1973, when HSA-UWC purchased East Garden, Moon loaned HSA-UWC $361,827 from the checking account to complete the $631,827 purchase. This transfer was carried on HSA-UWC's books as a personal loan from Moon. Later, when HSA-UWC was unable to meet mortgage payments on the $500,000 mortgage on "Belvedere," Moon broke a Chase time deposit and loaned $175,000 to the Church organization. HSA-UWC repaid Moon $70,000 of this loan, writing off the $105,000 balance as a personal contribution from Moon. The jury might well have inferred from the bookkeeping entries concerning these transactions that HSA-UWC considered the Chase funds Moon's exclusive property.

In November 1973 Moon directed that title to East Garden be transferred to him because he had supplied most of its purchase price from his personal funds, i.e., the Chase accounts. But before Moon's subordinates could complete this transfer they were informed by Church lawyers that Moon would have to pay the estate's fair market value of $700,000 in order to avoid adverse tax consequences for himself and the Church. To create this $700,000 consideration, loans to HSA-UWC from Moon amounting to $361,827 were falsely increased on the Church books to $700,000. Moon then signed a Release and Cancellation of Indebtedness Agreement covering the $700,000 purchase price for East Garden. Even though this document was never actually used, by signing it Moon implicitly acknowledged that the $361,827 used

to pay for the property, which had come from the Chase accounts, was his own.

Finally, the documents given by the defendants to the Justice Department to support their theory that Moon held the Chase funds and Tong Il stock other than individually were revealed to be fraudulently backdated. To understand how this came about it is helpful to capsulize Moon's finances at the beginning of 1974. At that time Moon had $556,000 in Chase time deposits, an outstanding loan of $361,827 to HSA-UWC made in connection with the purchase of East Garden, $50,000 and $4,000 in his Chase checking and savings accounts respectively and $50,000 worth of Tong Il stock. East Garden had $51,160 worth of furnishings purchased from Sothebys. These assets had a value in excess of a million dollars. At this point the leaders of HSA-UWC consulted a Washington law firm regarding a number of business and financial matters, including the transfer of East Garden into Moon's own name. The leaders were advised by counsel to keep Moon's assets separate from those of the Church, that Moon had to file a personal income tax return, that as a resident alien he was taxable on all income to him from whatever source, and that the custom of providing substantial gifts to Reverend Moon in kind or cash should be terminated.

After meeting with lawyers and accountants on January 3 and 4, 1974 it was decided not to have these professionals handle Moon's 1973 tax return. Instead, Kamiyama was to be in charge, preparing the return under Moon's instructions. Records were produced to account for the nearly 1.8 million dollars deposited into the Chase Manhattan Bank and to show these as the Church's assets rather than Moon's. Three hundred and fifty thousand dollars was accounted for as "loans" from

leaders of Unification organizations in England, France, Germany, Italy and the Netherlands. Each loan, signed by Kamiyama, bore a date and amount which matched, or in combination matched, a deposit into the Chase account in 1973. Another 1.2 million of cash deposited into Chase was accounted for by Japanese church members who, it was said, carried this money into the United States in amounts of three or four thousand dollars each. A ledger was kept—the Japanese Family Fund Ledger—with hundreds of entries showing a name, date of contribution and amount. The ledger also showed disbursements labelled "donations" which matched precisely the deposits into the Chase accounts.

With respect to the loans from the European leaders ostensibly made and entered into a loan ledger in 1973, a watermark expert established at trial that the paper on which these 1973 transactions occurred had not been manufactured until 1974. The Japanese Family Fund Ledger was also shown to be manufactured after the fact. Because some of the bank deposits consisted not of cash but of checks from sources other than Japanese donors, the government was able to demonstrate the falsity of the ledger. A comparison of Chase deposit slips, which included checks not reflected in the ledger, with the Japanese Family Fund Ledger revealed "donation" disbursements on the same date in the exact amount of each Chase deposit. A discrepancy appeared because the ledger disbursement indicated that the entire deposit in the same amount as the deposit slip was cash, while the proof at trial demonstrated that the deposit was partly in checks. Thus unravelled it appeared that Kamiyama's aide, Yukiko Matsumura, had constructed the ledger simply by working backwards from Moon's bank statements and deposit slips to create fictitious cash sources to account

for all of the deposits at Chase. Since she mistakenly thought each deposit was all cash the ledger entries and the total amount deposited into the bank accounts matched perfectly. When checks were included in the totals, however, the fraudulently backdated nature of the ledger was clearly revealed.

In sum the government presented evidence at trial that Moon controlled the Chase accounts and Tong Il stock, held them in his own name, considered the Chase accounts his own, used the accounts in a seemingly personal manner, and was regarded by other Church figures as owning the assets personally. Additionally, the documents produced by the defendants to show that the assets were in fact Church property proved to be backdated and false. Viewing this evidence in the light most favorable to the government, it is sufficient to establish that Moon owned the Chase accounts and Tong Il stock in a personal capacity. Because he owned the assets, he should have reported the interest and stock distribution income on his tax returns. Since he failed to do so, his 1973-75 returns were false.

(2) Willfulness

We turn to the evidence that Moon willfully filed income tax returns for the 1973-75 tax years knowing that these returns contained false information and that Kamiyama willfully aided and abetted the 1974 and 1975 filings. Willfulness in tax fraud cases has become equated with bad faith, want of justification or knowledge that the taxpayer should have reported more income than he did. *See United States v. Bishop*, 412 U.S. 346, 360 (1973). The Supreme Court collected the formulations cited in *Bishop* and reduced them to the statement that willfulness in the context of filing a false income tax

return "simply means a voluntary, intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

The evidence presented on this issue, although circumstantial, was sufficient to sustain the jury's verdict. The salient points follow. Moon signed his 1974 and 1975 returns, acknowledging that he had read them and that they were accurate, and he signed an RSC-12 form giving similar assurances as to his 1973 return; Moon and Kamiyama both knew of Moon's interest income at Chase and income from the distribution of Tong Il stock; Moon actively supervised all of his personal financial matters and never signed anything until he understood it; Moon's 1973 "personal income tax matters [were] being handled under his instructions by Mr. Kamiyama" (quoting from a wire communication sent by a Unification Church official); Kamiyama participated in the completion of Moon's 1973 returns directly; and the public accounting firm that prepared Moon's 1974 and 1975 returns was provided with false information and fraudulently backdated documents. As an example of this last point, the preparers of the 1974 return were shown the "loans" ledger of transactions from the European Church leaders to Kamiyama. These "loans" amounted to $200,000. The ledger then reflected that Kamiyama made a loan to Moon (backdated and signed by both defendants) for the $200,000. The accountants were advised that these loan agreements evidenced the fact that the funds on deposit in the Chase Manhattan Bank earning interest in Moon's name were not his funds, but were held by him only as nominee for the Church. Noteworthy is the fact that appellants' initial tax attorneys informed HSA-UWC leaders prior to the filing of Moon's 1973 return that he would have to pay taxes on all of his

United States income, from whatever source it was derived. No interest income was declared on the 1973 return, and only small amounts the two succeeding years. For example, Moon's 1973 return declared $14,458 income from the Unification Church of New York and no interest earned, although there was earned interest of $3,208 on the Chase accounts. On the 1974 return, reported income was $20,520 from Tong Il and $254 interest earned, although the deposits at Chase earned $59,079. On the 1975 return Tong Il income was reported at $37,080 and interest of $267, although the accounts at Chase earned $43,841. Moon apparently knew that the interest he *reported* in 1974 and 1975 on the small savings account at Chase was income to him; thus it seems reasonable for the jury to conclude that he also knew that the interest on his time deposits at the same bank, which came from withdrawals from the checking and savings accounts, was also income to him. We are unable to accept defendants' argument that as new residents of the United States they were unfamiliar with tax law. Not only are both defendants sophisticated businessmen, but they had at their disposal a small army of tax attorneys and accountants whose advice, unfortunately, was not sufficiently heeded.

Finally, Moon's signing of the aborted Release of Indebtedness on the East Garden transfer, discussed earlier, was an acknowledgment by him that the Chase accounts in his name were actually his funds and at the same time evinced his willingness to sign a false document to escape personal income tax liability.

B. The Conspiracy Count (Count One)

Moon next argues that the government presented no evidence that he personally entered into or participated in a conspiratorial agreement to file false tax returns or obstruct the tax fraud investigation against him. The facts adduced at trial contained ample evidence that several subordinates of Moon engaged in a continuing and agreed upon course of conduct amounting to a conspiracy to file false returns and obstruct justice. Included among these was Kamiyama, whose participation in the preparation of the 1973 return and whose part in the false and backdated "loan" agreements submitted to the accountants for preparation of the 1974 and 1975 returns has already been recounted. Viewed in the light most favorable to the government, Moon's argument of lack of involvement is unpersuasive. Not only was Moon the person with the greatest personal stake in the success of the acts in question, but there was proof that he exerted close scrutiny over his own personal affairs and was aware of the information contained in his tax returns. He signed one of the postdated loan agreements (the $200,000 loan from Kamiyama to Moon) which was later submitted to the IRS in connection with the audit of his returns. Finally, Moon and his associates, through Moon's personal lawyers, submitted to the Justice Department in 1981 the same falsely backdated documents that had earlier been submitted to the IRS and to Moon's accountants. In short, there was ample evidence for the jury to find that Moon participated in a conspiracy to file false tax returns and/or obstruct justice.

III

JURY INSTRUCTIONS

Moon objects to the trial court's instructions to the jury in three particular areas. First he contends that the instructions on the law of trusts were erroneous and incomplete. Second, he argues that certain instructions violated the First Amendment's Religion Clauses. And third he questions the instructions on intent. Although specific objections overlap to some extent, we will deal with them separately.

A. Charge on Trusts

Perhaps the most crucial area concerns the trial judge's charge on the law of trusts. Despite the fact that Moon did not, until late in the trial, clearly raise the claim that he was holding the assets in question in trust for the International Unification Church movement, the district court saw fit to instruct the jury on this defense theory. The defendant now objects to what he claims are errors and omissions in this charge. We believe that defendant's contentions fail, first, because the trial court was not required to charge the jury on the trust issue and, in any event, because the trust instructions were neither erroneous nor prejudicial.

As a preliminary matter, it is essential to inquire as to who had the burden of proof on the trust issue. Of course, the government must prove every element of the offense charged beyond a reasonable doubt. One of those elements is that Moon had income from the Chase accounts and the Tong Il stock distribution that he failed to report. Defendant may then present an "affirmative defense," one which does not rebut an element of the crime,

or some other defense which rebuts an element of crime. If defendant asserts an affirmative defense he bears the burden of proof on it. Here, since the defense theory that Moon was acting only as a trustee rebuts the "ownership" element of the crime charged, it was not an affirmative defense. Hence, the only burden on Moon was to present a prima facie case that he held the assets in trust. If the defense had successfully introduced into evidence this prima facie rebuttal of the element of ownership, the trial court would have been obliged to instruct the jury on the law of trusts and the government would still have had to prove beyond a reasonable doubt that Moon "owned" the assets.

A careful review of the evidence, however, reveals no proof that Moon actually held the subject funds in trust. In order to establish the defense of trusteeship, defendants would have had to produce evidence of the donors' intent to create a trust. Yet the only evidence even remotely touching on this issue was the testimony of Church members Matsumura and Porter and German Unification Church leader Werner who simply stated that they gave money to Moon, intending it as a donation to their church. They never mentioned the word "trust" or, more importantly, gave any indication that they intended to create a trust relationship. Accordingly, this evidence only demonstrated the charitable intent of the contributors, not the clear expression of intent necessary to create a trust.

Under New York law, which governs the issue of ownership, it is well settled that a donor's intent to create a trust must be clear and unequivocal. This rule is not limited to private trusts, as defendant claims, since the creation of a charitable trust also requires a clear expression of intent. *See, County of Suffolk v. Greater New*

York Councils, Boy Scouts of America, 51 N.Y. 2d 830, 832-33 (1980); *Lefkowitz v. Cornell University*, 35 A.D.2d 166, 173 (4th Dep't 1970) (while no particular words are required to create a charitable trust, the words relied upon to create such a trust must be unequivocal), *aff'd*, 28 N.Y.2d 876 (1971); 4 *Scott on Trusts* § 348, at 2769-70 (3d ed. 1967) (as with a private trust, person creating a charitable trust must manifest by his words or conduct an intention to create it); *Restatement (Second of Trusts* § 351 (1959).

The dissenting opinion, unfortunately, obscures the intent requirement, focusing instead on a totally distinct and, for purposes of this analysis, inapposite issue—the policy of upholding charitable trusts whenever possible by construing their terms liberally. For this proposition, the dissent cites *In re Price's Will*, 264 A.D. 29 *aff'd* 289 N.Y. 751 (1942) and *In re Durbrow's Estate*, 245 N.Y. 469 (1927), neither of which controls here. Each of these cases involved a written will which plainly expressed the testator's intent to create a trust. More specifically, *Price's Will* applied the *cy pres* doctrine and held that a charitable trust already in existence survived even after its primary purpose had terminated. Similarly, *Durbrow's Estate* held that a charitable trust will not fail for want of a definite beneficiary. It is true, therefore, that both of these cases support the policy of upholding charitable trusts; however, neither stands for the proposition that a charitable trust comes into being absent the clearly expressed intent to create it. Since the intent to create such a trust was clearly indicated by the written wills in *Price's Will* and *Durbrow's Estate*, the question of intent to create a charitable trust was not in issue.

Contrast these cases with the present one. Here, there is no evidence of intent to create a *trust*, only the vague

testimony of three witnesses establishing that a charitable *gift* had been made to the Church. Although we agree with the dissent's assertion that charitable trusts must be liberally upheld, there is no rule of law that presumes simply from a charitable gift the donor's intent to create a trust.

Thus, since defendants failed to make a prima facie case that Moon held the Chase accounts and Tong Il stock in trust, the trust issue was one that need not have been charged to the jury in the first instance. Any purported errors or omissions in the instructions were therefore harmless.[3]

In any event, we find that the defendant's objections to the trust instructions are without merit. Moon challenges the use of what he terms a "laundry list" of factors which the trial court instructed the jury to consider in determining whether a trust existed. He now asserts that important factors were omitted from this list, the vital issues of source of funds and donor's intent were buried in this extensive list, and some factors were misleading.

The claim of omissions is spurious, as all the factors alleged to be omitted were clearly charged. In connection with the first of these factors, i.e., whether the International Unification Church movement "had a specific organizational structure, written charter or constitution," the dissent believes that Judge Goettel should have said that a specific organizational structure was not a prerequisite to the existence of a charitable trust. But, the record reveals that immediately following the list of factors, Judge Goettel did so charge in the following language:

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3 The instructions on the law of trusts were essentially correct, as discussed *infra*, and occupied only a very small portion of the jury charge. Therefore, even though these instructions were not required, their inclusion could not have confused or misled the jury.

> As I have mentioned, you may consider whether the International Unification Church Movement had a specific organizational structure in making your decision. *However, the lack of a formal corporation does not prevent a religious movement from being the beneficial power of property held in the name of another* (emphasis supplied).

It ill-behooves an appellate court to engage in word-by-word parsing of a jury charge, *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973), substituting its own choice for those equally appropriate words already in the charge. With regard to the last two objections, the dissenting opinion is also critical of the trial court, not for its failure to charge correctly, but for its failure to instruct the jury to accord the greatest weight and thereby emphasize the factor of the "intent of the parties" who gave property to Moon. Each of the factors referred to was correctly stated by the trial court and all of them were equally relevant to the jury's determination. Undue emphasis on any was not required. The "list" was slightly over one half a page; it was hardly extensive and no important factor was buried.

Moon and the dissent also object to the "if-then" language in the following instruction on the ground that it impermissibly shifts the burden of proof to the defense to show that the interest on the Chase accounts was not taxable to him:

> If you find that the funds in the Chase accounts were the property of International Unification Church Movement or were held in trust by Moon for the International Unification Church Movement and used for church purposes and that the interest on those funds also belonged to the International Unifi-

> cation Church Movement and were used for it, then that interest would not be taxable income to Moon.

This "if-then" formulation did not shift the burden of proof to defendants to prove their innocence. First, the charge contained 30 separate instances properly stating the burden of proof, and read as a whole and in context, the charge on this particular issue clearly states the correct burden. Second, the implication, if any, is even stronger in Moon's own written request to the trial judge[4] which contained, in addition to this subject, five other "if-then" formulations. Third, since no objection was made to the trial court's charge as given, it was waived. *See United States v. Praetorious*, 622 F.2d 1054, 1061-62 (2d Cir. 1979), *cert. denied*, 449 U.S. 860 (1980). This belated argument is thus totally without merit.

Moreover, we find no error in the charge that trust property diverted is taxable to the extent diverted. The objections raised are that this "diversion" theory was not contained in the indictment, no instruction was given on partial diversion, and there was no explanation by the trial judge of what "diversion" means. Since diversion was not an element of the crime charged, it was not required to be included in the indictment. The crucial point is that Moon was indicted, tried and convicted for his false and fraudulent failure to report taxable income. Further, in response to the trust defense raised at trial, the court did properly instruct the jury on partial diversion when it charged that the funds diverted to Moon's per-

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[4] If you find that the Chase time deposits and the Tong Il stock were in fact the property of the international Church Movement, rather than the personal property of Rev. Moon, then the exclusion from Rev. Moon's tax returns of the interest earned by the time deposits and the Tong Il stock was proper, and did not make those returns false.

sonal use became taxable "to the extent so diverted." Obviously, the word "divert" is in common enough use and understandable by ordinary jurors, so as to require no explanatory charge. *Cf. United States v. Valencia*, 645 F.2d 1158, 1167 (2d Cir. 1980) (term "hesitation" did not need to be clarified).

Finally, the trial judge properly charged that "there is no trust if the person who receives the money is free to use it for his own benefit." This instruction was in accord with familiar law that the same person may not at one and the same time be the sole trustee and sole beneficiary of a trust. *In re Phipps*, 2 N.Y.2d 105, 108 (1956); 61 N.Y.Jur., *Trusts* § 214, at 395 (1968); *Restatement (Second) of Trusts* § 341(1) (1959).

B. Religion Clauses Objections

Moon objects to instructions that permitted the jury to find that if he used the Chase funds for his own business investments or personal ends—that is for other than religious purposes—such use would indicate the lack of a trust relationship. The defense urges that this instruction violated the First Amendment Religion Clauses because the trial court was obligated to charge that the jury must accept as conclusive the Unification Church's definition of what it considered a religious purpose. Under the definition now advanced as the Church's, *any use* of these funds by Reverend Moon was for religious purposes.

This argument overstates the scope of the protections afforded by the Religion Clauses. The term "religion" was defined by the Supreme Court nearly 100 years ago in *Davis v. Beason*, 133 U.S. 333, 342 (1980) as having reference to a person's views of his relations to his Creator. This definition seems unduly narrow today. In every religion there is an awareness of what is called

divine and a response to that divinity. 7 *The Encyclopedia of Philosophy* 143 (1972). But, there are religions which do not positively require the assumption of a God, for example, Buddhism and the Unitarian Church. Hence, a broader definition of the word religion—one which we think more accurately captures its essence—is that formulated by the pre-eminent American philosopher, William James, who said religion means: "*the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.*" W. James, *The Varieties of Religious Experience* 31 (1910). In referring to an individual's relation to what he considers the divine, Professor James used the word "divine" in its broadest sense as denoting any object that is godlike, whether it is or is not a specific deity. *Id.* at 34. Therefore, under the Religion Clauses, everyone is entitled to entertain such view respecting his relations to what he considers the divine and the duties such relationship imposes as may be approved by that person's conscience, and to worship in any way such person thinks fit so long as this is not injurious to the equal rights of others. "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." *Davis v. Beason*, 133 U.S. at 342. The Supreme Court continued, "however free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation." *Id.* at 342-43. To foreclose a court from analyzing a church's activities as needed to determine whether those activities violated a statute, on the ground that the First Amendment forbids such inquiry,

would mean that there are no restraints or limitations on church activities. *See Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973). The "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.

Holy Spirit Association v. Tax Commission, 55 N.Y.2d 512, 518 (1982), is inapposite. That case dealt with the inquiry that a court may conduct when determining whether a religious organization is entitled to a real property tax exemption under New York law. The principles there enunciated upon which appellant relies are relevant in that context and do not serve as precedent in a federal criminal tax prosecution.

Moon also argues that an omission from the charge—the so-called "Messiah" defense—permitted the jury to look at the assets held in his name "secularly," in violation of the First Amendment. Counsel asserts that Moon's worldwide followers believe him to be "potentially the new Messiah." From this theological premise the argument is made that Moon personifies the church movement and is indistinguishable from it. Since the Unification Church movement can owe no taxes on income derived from church-related activities, the defense argues that neither can Reverend Moon.

We do not accept this defense. The fact that Moon is the head of the Church does not mean that the Church itself is not a distinct and separate body. Moon's spiritual identity as leader of the Unification Church movement and his legal identity as a taxpayer are not the same. He is

the spiritual leader of the Church, as the Pope is the spiritual leader of the Roman Catholic Church, but he also has a legal identity as a distinct, individual human being. It is in this latter capacity that he, or the Pope, could have taxable income. It has long been held that a church may hold property legally free from government interference because such inference would violate the First Amendment. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51-52 (1815). But where property held individually and used personally gives rise to income, that income is subject to taxation. To allow otherwise would be to permit church leaders to stand above the law, a view we have previously rejected.

Finally, contrary to defendant's argument, the failure to charge that assets which came from church sources to be used for church purposes are not taxable to Moon, did not violate the "neutral principles" approach outlined in *Jones v. Wolf*, 443 U.S. 595 (1979). In *Jones* the Supreme Court held that the First Amendment prohibits the resolution of intra-church property disputes by civil courts interpreting religious doctrine, and required that civil courts defer the resolution of such issues to the highest hierarchical church organization. This "neutral principles of law" approach is one of several approved methods of resolving church property disputes between groups within the church. *Id.* at 602. The doctrine has no application to the facts of this case.[5]

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5 Contrary to the defendant's contention, the trial judge *did* instruct the jury that lack of a formal organizational structure would not prevent the Unification Church movement from being the beneficial owner of the property in question.

C. Charge on Intent

The final jury charge objections deal with the issue of intent in two particulars. First, Moon objects to the "if-then" formulation contained in the following instruction:

> *If* you find that Moon provided the person who prepared the tax return with full and honest information as to his income and that Moon then adopted, signed and filed the tax returns as prepared in the belief that the return contained the full and honest information he had provided to the preparers regarding income, *then* you must find defendant Moon not guilty.

(emphasis added). This objection is rather surprising, in light of the fact that the defendant requested the following charge:

> *If* you find Rev. Moon and his representatives acted in good faith in providing the information that they believed to be relevant to the determination of Rev. Moon's tax liability and that they responded fully and candidly to Peat, Marwick's requests for additional information relating to the Chase accounts, *then* you must find defendant Rev. Moon not guilty of the false return counts for 1974 and 1975.

(emphasis added). Needless to say, the defendant cannot now be heard to complain of the same "if-then" formulation he requested. In fact, this requested language was preceded by a sentence which shifted the burden of proof even more emphatically to the defendant than did the charge given by the court.

Second, the intent charge gave the jury factors to consider in evaluating defendant's state of mind. Among

those mentioned as an affirmative act designed to conceal consciousness of wrongdoing was "dealing in cash." Moon claims that dealing in cash is a common practice in the Orient and could not, therefore, be interpreted as evidence of intent to conceal. In tax fraud cases evidence tending to show misconduct through extensive dealings in cash is properly admitted into evidence, *see United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970). It is, therefore, properly chargeable. And, in any event, the "dealing in cash" language was immediately followed by a balancing charge that "openness in conduct" could give rise to the inference that the taxpayer believed he had done nothing wrong and "had nothing to hide."[6]

IV

MISCELLANEOUS ISSUES

A. Selective Prosecution

Both appellants contend that the prosecution mounted against them was impermissibly motivated by hostility toward their religion and that the district court erred in denying their request for discovery and a hearing on the issue of selective prosecution. In this Circuit, a defendant who advances a claim of selective prosecution must do so in pretrial proceedings, *see United States v. Taylor* 562 F.2d 1345, 1356 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977). The person asserting such a claim bears the burden of establishing *prima facie* both:

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6 Moon also contends that this language contravened the Religion Clauses by inviting the jury to treat the Church's practice of soliciting cash contributions from the public as suspect. But the charge clearly refers to *Moon's* conduct and not Unification Church practices.

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Berrios, 510 F.2d 1207, 1211 (2d Cir. 1974). No evidentiary hearing or discovery is mandated unless the district court, in its discretion, *see id.* at 1212, finds that both prongs of the test have been met. *See United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *Berrios*, 501 F.2d at 1211. We cannot say on this record that the district court abused its discretion in holding that appellants failed to demonstrate the necessary factual predicates for their claim of selective prosecution.

The only evidence offered pretrial in support of appellants' assertion of selective prosecution was to the effect that Congress had previously conducted an investigation into Korean-American relations (Koreagate), that such investigation had touched upon the Unification Church, and therefore that the government's prosecution of Moon could be seen to have stemmed from impermissible religious and/or political hostility. No other evidence was submitted in support of the motion. The proof before the trial court was wholly insufficient to mandate further inquiry or a hearing and the court's rejection of the claim of selective prosecution at that point was clearly proper.

Following the trial, and in an arguably untimely manner, appellants submitted additional "evidence" of selec-

tive prosecution. Specifically, they presented affidavits from four individuals who, while disavowing any knowledge of the government's motive in this case, asserted that they held church funds in their own names and did not pay taxes on interest earned on the funds. Moon also submitted a copy of a letter from United States Senator Robert Dole to the IRS requesting that it look into the Unification Church's tax exempt status. While acknowledging that Moon's status as a highly visible, religious leader may well have led to the audit of his tax returns, the district court reasoned that the government's decision to institute criminal rather than civil charges was a wholly separate decision and that the additional evidence of improper prosecutorial motive submitted by appellants still failed to satisfy the requirements of *Berrios*. We need not decide here whether appellants' post-trial submission of evidence regarding selective prosecution was too late; even considering that evidence, the district court correctly concluded that it was insufficient to meet the *Berrios* standard.

With respect to the first requirement of *Berrios*—proof that "others similarly situated" have not been prosecuted—the four above-mentioned affidavits of other church leaders did not adequately prove *Berrios'* first prong for two reasons. First, the government's theory against Moon was that the funds he held were his own personal property and that therefore any interest earned on the funds was taxable to him. By contrast, the submitted affidavits describe situations involving persons who claim to hold church funds, as opposed to personal funds, in their own names and pay no taxes on interest earned by the funds. While Moon still contends that the funds he held were church property, at the time of this post-trial motion the jury had squarely rejected this

theory. Second, this case also involved charges of perjury and obstruction of justice. Reference to these charges is totally ignored in appellants' analysis of whether similarly situated individuals have been prosecuted. In short, appellants simply failed to provide the necessary *prima facie* evidence that others similarly situated have not been prosecuted.

As for the second prong of *Berrios*—proof that the government's decision to prosecute was based on impermissible considerations of race and/or religion—appellants rely heavily on the above-mentioned letter from Senator Robert Dole to the IRS. That letter merely requested an audit of the Unification Church's tax exempt status. It did not request an audit of Moon's personal tax status, suggest that he be criminally prosecuted, or indicate any racial or religious bias. Thus, we fail to see how the letter can be said to constitute *prima facie* evidence that the decision to prosecute Moon was the product of an impermissible motive. Appellants have therefore failed to satisfy either prong of *Berrios*.

We recognize that Moon is a controversial public figure who has been subjected to extensive media attention, much of it critical, and that his church may perhaps be viewed by the general public in an unfavorable light. These facts naturally tend to foster suspicion that the motive behind this prosecution might have been improper. That naked suspicion cannot serve as a substitute for the evidentiary showing mandated by *Berrios*. This case is not the first occasion when a controversial political or religious figure has been criminally prosecuted; and if history teaches us anything, plainly, it will not be the last. By their very nature, such highly visible cases will always engender some suspicion with respect to the government's *bona fides*. But to engage in a collateral inquiry respect-

ing prosecutorial motive, there must be more than mere suspicion or surmise. If a judicial inquiry into the government's motive for prosecuting could be launched without an adequate factual showing of impropriety, it would lead far too frequently to judicial intrusion on the power of the executive branch to make prosecutorial decisions. Unwarranted judicial inquiries would also undermine the strong public policy that resolution of criminal cases not be unduly delayed by litigation over collateral matters.

B. Interpreters Act

The next issue raised concerns the Court Interpreters Act of 1978, 28 U.S.C. § 1827 (Supp. V 1981). It provides in pertinent part that:

> The presiding judicial officer . . . shall utilize the services of the most available certified interpreter . . . in any criminal or civil action initiated by the United States in a United States district court . . . if the presiding judicial officer determines . . . that [a] party (including a defendant in a criminal case), or a witness who may present testimony in such action—
>
> (1) speaks only or primarily a language other than the English language; or
>
> (2) suffers from a hearing impairment (whether or not suffering also from a speech impairment)
>
> so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

28 U.S.C. § 1827(d) (Supp. V 1981). The Act further provides that persons, "other than witnesses," may waive,

with the court's permission, their entitlement to a court-appointed interpreter and use their own translator instead. 28 U.S.C. § 1827(f) (Supp. V 1981).

During pretrial proceedings, Moon moved pursuant to § 1827(f) to waive the use of a court-appointed interpreter and to employ instead his own personally-selected translator. The district court ruled that Moon was free to use the interpreter of his own choice for purposes of translating the proceedings of the trial to him; but, that if Moon elected to testify, his testimony would have to be translated by a court-appointed, certified interpreter. Moon elected not to testify at his own trial.

While it was not argued below that the use of a court-appointed translator would impinge upon Moon's ability to communicate effectively with the jury, he now argues that the district court incorrectly construed § 1827(f) to preclude him from waiving the use of an appointed interpreter if and when he elected to testify. Specifically, he asserts that if he had testified, he would have been a party-witness, that a party-witness is not a "witness" within the meaning of § 1827(f), and that he therefore should have been allowed to waive the use of a court-appointed interpreter.

Moon's premise—that party-witnesses are somehow different from other witnesses for purposes of § 1827(f)—is untenable. The express language of subsection (f) makes no such distinction. While § 1827(d) does refer to "parties" and "witnesses" separately, this language does not create a distinction that must be carried over to subsection (f). The legislative history of § 1827(f) indicates that its purpose was to prevent *parties* from using untrustworthy translators. For example, the House Judiciary Committee Report in discussing the waiver provision refers to the danger of allowing "an individual to

waive use of a certified interpreter and then to substitute their own personal interpreter [which] might create an opportunity for a *party* to use an unscrupulous interpreter." H.R. Rep. No. 95-1687, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4652, 4656. (emphasis added). To interpret the § 1827(f) term "witness" so narrowly as not to include party-witnesses, as Moon now suggests, would seriously undermine Congress's scheme of using independent interpreters to insure accurate translations. Thus, the district court correctly ruled that under § 1827(f), if Moon elected to testify, he would have to speak through a certified, court-appointed interpreter.

Moon further argues that requiring him to testify through a court-appointed interpreter impermissibly burdened his Fifth and Sixth Amendment rights to present a full defense. Citing *Brooks v. Tennesee*, 406 U.S. 605 (1972), he asserts that by depriving him of the opportunity to testify through an interpreter of his own choosing, the district court unconstitutionally restricted his decision as to whether or not he would testify. *Brooks* dealt with a state requirement that a defendant choosing to testify must testify at the beginning of the defense case before any other testimony is heard. This restriction is different from that now at issue. By forcing a defendant to decide whether he will testify at a point in the trial where a realistic assessment of the value of his testimony is difficult, the condemned state provision in *Brooks* restricted the privilege to remain silent because it put the defendant at an unfair tactical disadvantage in deciding whether to exercise his privilege. *Id.* at 610-11. The Interpreters Act does not make the assertion of the privilege similarly costly; it simply ensures that whatever testimony a defendant gives is honestly reported.

Moreover, even were requiring Moon to use a court-appointed interpreter to be viewed as some restriction on his ability to present a full defense, we observe that not all restrictions on a defendant's right to testify are *per se* impermissible. *See e.g., United States v. Bifield*, 702 F.2d 342, 350 (2d Cir.), *cert. denied*, 51 U.S.L.W. 3826 (U.S. May 5, 1983). For example, certain evidentiary and procedural restrictions are sanctioned where reasonably necessary to the achievement of a fair trial. *See id.* There is no evidence here that use of a court-appointed interpreter would have been unfair to Moon and he has not suggested why it would have been. We regard § 1827 as reasonably designed to further the legitimate public interest in the fair administration of criminal trials. Such interest necessarily requires accurate and unbiased translations of trial testimony. Since the statute does not force a defendant who elects to testify to do so at any unfair disadvantage, we hold that the district court's application of § 1827 did not impermissibly restrict Moon's constitutional right to present a full defense.

C. Evidentiary Problems

Both defendants raise questions regarding the admissibility of certain evidence at trial. Moon contends that the district court erred in allowing the government to introduce various immigration documents as similar act evidence. Kamiyama complains that the prejudice created by this evidence infected his trial by "spilling over." Additionally, Kamiyama challenges the admission during the government's rebuttal of evidence concerning his failure to file income tax returns in 1973 and 1974. Finally, both defendants claim that the government presented improper evidence to the jury regarding the religious practices of

the Unification Church which they claim permitted them to be tried by religious innuendo.

After the defense rested, the government introduced documents relating to Moon's and his wife's applications for permanent residence in the United States. Contained in these documents were what the government maintained were false representations concerning the Moons' income for 1972 and 1973. The government argued that such evidence was probative of Moon's intent and knowledge because it was relevant on the question of absence of mistake regarding the preparation of the tax returns.

We acknowledge the long held view of this Circuit that the trial judge is in the best position to weigh competing interests in deciding whether or not to admit certain evidence. *See United States v. Birney*, 686 F.2d 102, 106 (2d Cir. 1982). Absent an abuse of discretion, the decision of the trial judge to admit or reject evidence will not be overturned by an appellate court. *Id.* In reviewing the district court's determination we turn to Federal Rule of Evidence 401 which states that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The government argues now, as it did at trial, that the submission of false immigration documents was relevant to Moon's intent in filing the false tax returns. We do not see how the submission of the false immigration papers to the Immigration and Naturalization Service in one instance is relevant to the defendant's intent to submit unrelated false papers to the IRS in another. *Cf. United States v. Halper*, 590 F.2d 422, 432 (2d Cir. 1978) (submission of false tax return not relevant as to whether defendant intended to submit false Medicaid claims, and vice versa). Admission of this irrelevant

evidence constituted an abuse of the trial court's discretion. Nevertheless, in light of the strong evidence relating to Moon's intent to file false tax returns, see Section II A.(2) *supra*, the error must be deemed harmless. *See United States v. Quinto*, 582 F.2d 224, 235 (2d Cir. 1978).

With respect to Kamiyama's claim of spillover, the trial court's charge contained the cautionary instruction that the immigration documents were to "have no bearing on the case against [Kamiyama]." This instruction, coupled with the fact that the government made no claim that Kamiyama had any connection with the Moons' immigration papers, was sufficient to safeguard adequately against impermissible prejudice. *See United States v. Reed*, 639 F.2d 896, 907 (2d Cir. 1981).

Kamiyama's major claim of evidentiary error relates to the admission of an IRS certificate indicating that there was no record of Kamiyama having filed federal income tax returns for the years 1973 and 1974. It was the government's contention that the certificate was relevant on the issue of Kamiyama's motive to create the Family Fund Ledger. Purportedly, Kamiyama paid $10,000 cash for 100 shares of Tong Il stock in 1973 and $110,000 cash for 1,100 shares of Tong Il stock in 1974. The government argued that this "untraceable" cash was income and that to cover up the source of this money Kamiyama concocted the Family Fund Ledger. Since precisely the same scenario was established to account for the cash deposits in Moon's Chase accounts, the jury was entitled to infer from Kamiyama's conduct, so the government argues, that his handling of Moon's returns was with the requisite criminal intent and knowledge.

Nonetheless, there was no proof that Kamiyama had income sufficient to require him to file a tax return for the years in question. Simply purchasing stock with cash

is not proof that Kamiyama had taxable income, since the cash might have come from some other source, *see Marcus v. United States*, 422 F.2d 752, 755 (5th Cir. 1970). Lacking a proper foundation, *see Dupree v. United States*, 218 F.2d 781, 784 (5th Cir.), *reh'g denied*, 220 F.2d 748 (5th Cir. 1955), the IRS certificate was not relevant evidence and it was improperly admitted. We note that the certificate and the testimony accompanying it were admitted in the government's case on rebuttal and that this proof occupied an insignificant portion of the trial record, was not raised in summation, and was not in the trial court's instructions to the jury. Balanced against the other evidence of Kamiyama's guilt, we find this error harmless.

With respect to trial by religious innuendo, concededly there was testimony that members of the Unification Church lived and worked together, donating their earnings to their church.[7] The central issue for the jury to decide was whether the Tong Il stock and Chase Manhattan Bank accounts belonged to the Church or to Moon personally. In probing that issue, it was inevitable that some Unification Church practices would creep into the trial in order to illustrate Moon's control over the activities of other church officials. The question before us is whether evidence of Church practices, although relevant, should have been excluded because "its probative value [was] substantially outweighed by the danger of unfair prejudice," Fed. R. Evid. 403. The trial judge from his superior vantage point is in the best position to weigh these competing interests. *See United States v. Robinson*,

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7 We note that the Unification Church members' mode of living, evidence of which appellants claim amounts to religious innuendo, is also prevalent in certain centuries-old orders of Christians and Buddhist monks.

560 F.2d 507, 514 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978). Absent an abuse of his broad discretion, the decision of the trial judge to admit the challenged evidence of religious practices must stand. To find such abuse, we must conclude that the trial judge acted arbitrarily or irrationally: to avoid acting arbitrarily a court must make a conscientious assessment when weighing probative value against the risk of unfair prejudice. *United States v. Birney*, 686 F.2d at 106. A thorough review of the record reveals no abuse of the district court's discretion.

D. Post Trial Proceedings

After the trial was concluded claims surfaced of improper influences on the jury. These allegations arose when a Unification Church member, attorney David Hager, was contacted by a man named Bruce Romanoff who was apparently attempting to sell tape recordings of phone conversations between Romanoff's associate, John Curry, and former trial juror Virginia Steward, a personal friend of Curry. On these tapes Steward made various statements indicating that the jury might have been exposed to extraneous prejudicial information and improper outside influences. After conducting a hearing where Romanoff, Curry, Steward and two other potentially knowledgeable jurors, forelady Mary Nimmo and John McGrath, were questioned, the trial court concluded that no grounds existed to believe that the jury had been exposed to improper outside influences or extraneous prejudicial information and that there was no need to continue the inquiry.

It hardly bears repeating that courts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, miscon-

duct or extraneous influences. As we explained in *United States v. Moten*, 582 F.2d 654, 666-67 (2d Cir. 1978), a trial court is required to hold a post-trial jury hearing only when reasonable grounds for investigation exist. Reasonable grounds are present when there is clear, strong, substantial and incontrovertible evidence, *King v. United States*, 576 F.2d 432, 438 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978), that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant. A hearing is not held to afford a convicted defendant the opportunity to "conduct a fishing expedition." *United States v. Moten*, 582 F.2d at 667. Although the circumstances in the decided cases are instructive, each situation in this area is *sui generis*. *United States v. Barnes*, 604 F.2d 121, 144 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

This same standard, which applies to a trial judge's determination of whether to hold a post-verdict hearing, is also useful in ascertaining whether the scope of a hearing that has been held is adequate. While the breadth of questioning should be sufficient "to permit the entire picture to be explored," *United States v. Moten*, 582 F.2d at 667, that picture is painted on a canvass with finite boundaries. Therefore, in the course of a post-verdict inquiry on this subject, when and if it becomes apparent that the above-described reasonable grounds to suspect prejudicial jury impropriety do not exist, the inquiry should end.

Moon asserts that the district court improperly curtailed defense attempts to conduct a more thorough inquiry and that at the post-trial hearings three areas should have been explored further. First, he claims it was error to block defense efforts to find out whether the jurors discussed Moon's request not be tried by a jury.

This fact was allegedly reported at the end of a newspaper article which concerned a *different* topic that had apparently been mentioned by Nimmo and discussed among the jurors. But all the jurors questioned stated that they had not read the article, and the two found to be credible by the court below noted that the main subject of the article was mentioned only casually and was passed-off lightly. None even indirectly intimated that Moon's request concerning a jury trial was known to them, let alone a topic of conversation before the jury at large. Moreover, Moon has not shown how he would be prejudiced even were the jurors aware of his desire to be tried without a jury.

Second, Moon claims that the trial court erred by refusing to call additional jurors to explore the issue of newspapers in the jury room. The fact that there were newspapers in the jury room is an insufficient predicate for conducting a post-verdict inquiry. The jurors were instructed not to read articles concerning the case before them; they were not absolutely precluded from looking at newspapers. All of those questioned indicated that they had not read articles about the case, did not know of any jurors who had, and had not heard other jurors discussing such articles (other than the one alluded to above). One said she did not look at the newspapers, another said she only played the "Wingo" game, and the third said he and others cut out articles about the case, but he was saving these to read after the trial. There has been no showing, let alone a substantial one, that any of the jurors read prejudicial newspaper accounts of the case. Moon's claim that some juror *might* have done so is a speculative argument insufficient to justify further inquiry.

Third, Moon argues that it was necessary to call juror Esperanza Torres to the stand and to explore the circumstances surrounding the firing of a shot through Torres's window during the trial. Steward testified that Torres had been upset one day because a shot had been fired through her window the night before, and that Torres intimated to Steward that the incident might be connected to her jury service. Steward also related that Torres told her the police had investigated, found no bullet, and concluded that the hole in Torres's window was most likely caused by a BB shot by "just some fresh kids . . . fooling around." Steward apparently thought little of the incident since Torres lived in a bad neighborhood, and when Torres had been similarly upset after her car was hit from behind, Steward told her not to be silly and that it was just a coincidence. Nimmo confirmed having heard second-hand of the BB incident and that it was probably due to the nature of Torres's neighborhood, but she had not heard that Torres attributed it to the trial. McGrath, who sat next to Torres in the jury box, heard nothing about these events.

Given these facts it was unnecessary for the district court to probe any further into the event since, unlike the circumstances in *Remmer v. United States*, 347 U.S. 227 (1954), *appeal following remand*, 350 U.S. 377 (1956) and *United States v. Gersh*, 328 F.2d 460 (2d Cir. 1964), there was no rational basis to connect these outside incidents with the trial. Moreover, even if Torres had been interrogated, she could only have been questioned about "whether any outside influence was improperly brought to bear upon" her, and could not have been asked about "the effect of [the incident] upon [her] mind or emotions as influencing [her] to assent to or dissent from the verdict," Fed. R. Evid. 606(b). The most she could have

done was to repeat the story about the BB shot, but it would violate Rule 606(b) to have her juxtapose the incident with her jury service and have her testify that it influenced her vote. *See United States v. Beltempo*, 675 F.2d 472, 481 (2d Cir.), *cert. denied*, 102 S. Ct. 2936 (1982). Without calling Torres the court had sufficient information from which it could conclude that there was no outside influence improperly brought to bear upon her, and that any supposed connection between the two events and the trial was not and could not be supported factually.

Of course, "[t]he safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible" and "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). It is up to the trial judge to determine the effect of potentially prejudicial occurrences, *id.*, and the reviewing court's concern is to determine only whether the trial judge abused his discretion when so deciding. Whether or not we, sitting in the trial judge's place, might have called Torres to testify is not the issue. We cannot say that Judge Goettel abused his discretion by ending the post-trial inquiry when he did.

At the conclusion of the post-verdict jury inquiry, the district judge also ordered, on pain of contempt,

> that the defendants . . . and their agents, the defense attorneys and their agents, and the Government attorneys and their agents, are restrained from communicating with, or contacting in any manner whatsoever any juror, alternate juror, or . . . prospective juror in the [instant] case, without prior consent of the Court.

Defense counsel argue that this amounts to a gag order which violates the First Amendment because, when read in conjunction with the court's accompanying memorandum decision, it placed a prior restraint on all Unification Church members, forbidding them from communicating with the media on the subject of jury prejudice in Moon's case. Aside from the fact that the memorandum does not say this, such a reading of the clear, unambiguous language of the restraining order is far-fetched. While the accompanying memorandum sheds light on the court's reasons for imposing and power to impose the restraint against jury contact, it is gratuitous insofar as the content of the order itself is concerned. Moreover, we lack appellate jurisdiction to review this order and mandamus is inappropriate where, as here, the district court's power to act as it did is unquestionable. *See Miller v. United States* 403 F.2d 77 (2d Cir. 1968) (no appellate jurisdiction, and virtually identical order condoned).

V

KAMIYAMA CLAIMS

A. Intent to Impede the Grand Jury Investigation

Kamiyama contends that his conviction for knowingly submitting false and misleading documents to the grand jury with intent corruptly to impede its investigation, in violation of 18 U.S.C. § 1503 (Supp. V 1981), must be set aside. Specifically, he asserts that he only submitted the documents in question (the Family Fund Ledger and European Loan Agreements) to the grand jury because it had subpoenaed them and that there was insufficient evidence that he intended to impede its investigation. In response to this challenge, the government answers that

Kamiyama's corrupt intent was adequately demonstrated by the facts that he could have resisted production of the documents on Fifth Amendment grounds and that he vouched for the accuracy of the documents in his testimony before the grand jury. Specific intent to impede the administration of justice is an essential element of a § 1503 violation, *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972) (citing *Pettibone v. United States*, 148 U.S. 197 (1893)), which the government must establish beyond a reasonable doubt. Viewing the evidence in the light most favorable to the prosecution, we are unpersuaded that Kamiyama's corrupt intent was adequately proved.

In examining the evidence underlying this Count, we may look only to that evidence actually introduced before the petit jury. There would be no problem with the government's contention had it introduced proof before the petit jury to the effect that Kamiyama had not only produced the questionable documents, but had also affirmatively vouched for their accuracy. Similarly, the government's case would be more persuasive were there any evidence that Kamiyama had submitted the documents with the knowledge that, had he chosen, he could have resisted production on the grounds of self-incrimination. On both of these points the government fails to direct us to any portion of the trial record in which such evidence was brought to the petit jury's attention. Nor have we, after reviewing the actual trial transcript, found any such evidence.

What remains to be answered is whether the petit jury could still properly infer corrupt intent from the fact that Kamiyama submitted the false documents to the grand jury knowing that the documents were material to that jury's investigation. Intent to obstruct justice is normally

something that a jury may infer from all of the surrounding facts and circumstances. *See United States v. Haldeman*, 559 F.2d 31, 115-16 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *cf. United States v. Dibrizzi*, 393 F.2d 642, 644 (2d Cir. 1968) (dealing with intent to embezzle). Were it not for the fact that the documents were subpoenaed, such an inference would doubtless have been permissible in this case. But here the ledger and loan agreements were produced pursuant to subpoena and even though there was ample proof of their being falsely backdated, there was no evidence of Kamiyama's corrupt intent in producing them. Whether or not Kamiyama could have resisted production, as the government argues, evidence of this government theory was not before the trial jury. Without it, a reasonable doubt as to Kamiyama's *mens rea* exists. Therefore, his Count Seven conviction must be reversed.

B. False Declarations Before the Grand Jury

Kamiyama also attacks his convictions under Counts Eleven, Twelve and Thirteen of the main indictment and the only count of the additional indictment (No. 194). As earlier noted, those counts charged Kamiyama with making false declarations to a grand jury, in violation of 18 U.S.C. § 1623 (Supp. V 1981). That statute provides in pertinent part that "[w]hoever under oath . . . in any proceeding before or ancillary to any . . . grand jury of the United States knowingly makes any false material declaration" shall be guilty of a crime. 18 U.S.C. § 1623(a). Before addressing the precise issues raised some background information is necessary.

In March 1981 Kamiyama appeared before the June 1980 Additional Grand Jury for the Southern District of New York (Grand Jury) but refused, on Fifth Amend-

ment grounds, to testify. In July 1981 Kamiyama changed his mind and testified before both the Grand Jury and a substitute grand jury which was filling in for the Grand Jury while its members were on vacation. Counts Eleven, Twelve, Thirteen and No. 194 involve statements initially made and recorded before this substitute grand jury and later presented to the Grand Jury in accordance with the latter's instructions.

Prior to trial appellant moved to dismiss the perjury counts arising from his testimony before the substitute grand jury on the ground that this testimony was not material to any investigation being conducted by the substitute grand jury. In a published decision, the district court agreed that Kamiyama's statements to the substitute grand jury technically were not material to any investigation then being conducted by it. *United States v. Moon*, 532 F. Supp. 1360, 1371 (S.D.N.Y. 1982). Nevertheless, the district court refused to dismiss the subject counts, reasoning that § 1623(a) extends to proceedings ancillary to those of a grand jury and that at the time Kamiyama testified before the substitute body it was acting in such an ancillary capacity. *Id.* On that basis the trial judge found that Kamiyama's substitute grand jury testimony was material to an investigation being conducted by the Grand Jury. The petit jury thereafter impiedly found by its conviction of defendant on Counts Eleven through Thirteen and No. 194 that Kamiyama gave the testimony knowing it to be false.

Kamiyama now challenges the district court's materiality finding. He argues that the substitute grand jury could not, as a matter of law, constitute an ancillary proceeding; that there was no evidence that the substitute grand jury was ancillary; that the district court erred in ruling on the ancillary proceeding question rather than submit-

ting it to the petit jury; and that the district court impermissibly amended the indictment by relying on the ancillary proceeding theory which was not set out in the indictment. Moreover, he contends that there was insufficient evidence that his misstatements were material to the Grand Jury which eventually heard them. For the reasons discussed below these arguments are of no avail.

Section 1623 proscribes false declarations made before a grand jury where those declarations are "material," i.e., made in response to questions within the purview of matters that the grand jury is investigating. *United States v. Berardi*, 629 F.2d 723, 727 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980); *see United States v. Mulligan*, 573 F.2d 775, 779 (2d Cir.), *cert. denied*, 439 U.S. 827 (1978). Whether or not a false declaration is material to a grand jury investigation is a question of law that must be determined by the court, not the jury. *Sinclair v. United States*, 279 U.S. 263, 298-99 (1929) (dicta); *Berardi*, 629 F.2d at 728; *Mulligan*, 573 F.2d at 779. Materiality is demonstrated if the question posed is such that a truthful response could potentially aid the inquiry or a false answer hinder it. *Berardi*, 629 F.2d at 728. Because materiality is a question of law, an appellate court may substitute its judgment for that of the lower court on the issue of whether the materiality element has been met. *See Berardi*, 629 F.2d at 728-29 (holding that the district court erred in finding false declaration immaterial).

Because we disagree with the district court's holding that Kamiyama's statements "technically" were not material when made to the substitute grand jury, we need not reach or decide the numerous questions regarding whether the substitute grand jury was conducting an ancillary proceeding. The district court's finding that Kamiyama's statements were immaterial to the substitute

grand jury is at odds with the only evidence in the record on this point. There is uncontradicted, direct testimony in the record by Assistant United States Attorney Martin Flumenbaum that both the Grand Jury and the substitute grand jury were investigating Moon for possible tax violations. For example, Flumenbaum testified that the substitute grand jury was "charged with investigating the same matters that [the Grand Jury] was doing." This testimony was supported by affidavit evidence to the effect that: the Grand Jury approved in advance the procedure by which Kamiyama testified before the substitute grand jury, which was advised as to the substance of the on-going investigation of Moon and informed of the context in which Kamiyama was testifying; on two occasions the substitute grand jury heard testimony from another witness in this case; and the substitute grand jury actively participated in the proceedings by asking numerous questions relating to the handling of Moon's tax and business affairs and by requesting the production of documentary evidence. If the substitute grand jury cannot be said to have been investigating Moon's tax affairs when it was asking Kamiyama about those affairs, it is difficult to perceive exactly what it was doing.

Since both grand juries were investigating Moon's tax affairs, it seems somewhat illogical to say that Kamiyama's answers were immaterial when given to the substitute grand jury, but material, as the district court found they were, when repeated verbatim to the indicting Grand Jury. Our examination of the questions and responses in issue further strengthens our conviction that they were material to both grand juries' inquiries. The questions and answers set forth in Counts Eleven, Twelve, Thirteen and No. 194 do not deal simply with tangential matters of no relevance to the instant prosecution. Instead, they are

concerned with the sources of Moon's Chase accounts funds, the Family Fund Ledger, the acquisition of the Tong Il stock, and the manner in which Moon conducted his business affairs. These matters were at the very heart of both grand juries' inquiries and related to the critical issues at trial. As a matter of common sense, we do not believe there is any basis to label them immaterial.[8]

C. Claimed Translation Inaccuracies

Kamiyama further contends with respect to his perjury convictions that he was impermissibly indicted and convicted for statements he did not give. Because his principal language was Japanese, he addressed the grand juries through an interpreter. At the request of counsel tape recordings were made of Kamiyama's grand jury statements. After being indicted for perjury in October 1981, Kamiyama received copies of the tape recordings of his testimony. After they were reviewed by defense counsel Kamiyama moved to dismiss certain specifications contained in Counts Ten through Thirteen on the ground that the allegedly perjurous language did not accurately reflect what he had actually said to the grand jury. He also requested that a court-appointed translator review the accuracy of the challenged language. Before the trial court ruled on Kamiyama's motion, a superseding indict-

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[8] Our decision on the materiality issue does not intrude on appellant's double jeopardy rights under the Fifth Amendment since it neither necessitates a retrial nor has the effect of setting aside a judgment of acquittal on the merits. *See Berardi*, 629 F.2d at 730; *cf. Whalen v. United States*, 445 U.S. 684, 688 (1980) (double jeopardy protects against a second trial for the same offense); *United States v. Scott*, 437 U.S. 82, 91 (1978) (judgment of acquittal may not be appealed and terminates prosecution when reversal would necessitate new trial). We have merely adopted another basis for affirming the district court's conclusion that Kamiyama's substitute grand jury statements were material.

ment was returned which omitted two of the allegedly inaccurate specifications in Count Ten.

The trial court ultimately appointed an interpreter to translate the tape recording of those portions of Kamiyama's grand jury testimony included in the indictment. Judge Goettel also requested defense counsel to "specify the particular portions of the translation that [were] in dispute." This was done at a pretrial hearing held on March 5, 1982. With respect to the objections to Counts Ten and Eleven, the district court found no significant difference between Kamiyama's testimony as set out in the superseding indictment and the court-appointed translator's interpretation of the recordings of that testimony. It did agree with Kamiyama's claims that certain Count Twelve testimony had been translated inaccurately and it dismissed all of that Count's specifications objected to by Kamiyama. With regard to Count Thirteen, the court found that the appointed translator's version of what Kamiyama had said agreed with the language quoted in the indictment, and counsel for Kamiyama accepted those translations as being accurate. The government later obtained a superseding Count Twelve indictment which omitted the previously objected to language.

At trial Kamiyama did not argue that the translation of the testimony set forth in the remaining false declaration counts was inaccurate. After the close of the evidence, the district court granted Kamiyama's request to make the court translator's translation an exhibit which the jury could see, if requested. Although the jury was so informed, apparently it did not request the exhibit.

On appeal Kamiyama now asserts that "all specifications" in the perjury counts were erroneously translated and fatally ambiguous.[9] Close examination of appellant's

[9] Citing *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972), Kamiyama also contends that the prosecution abused the grand jury

contentions reveals that some of the points raised actually relate to sufficiency of the evidence as to falsity, not to accuracy of translation. In any event we address appellant's "translations" contentions one count at a time.

With respect to Count Nine, appellant asserts that while he was indicted for answering in the negative the question "did" Reverend Moon sign any documents dealing with stock, the question actually posed was whether Reverend Moon ever "had" to sign such documents. This claim of inaccurate translation was not raised in defendant's pretrial motion to dismiss; nor did he attempt to bring the purported infirmity to the attention of the court or jury at trial. Consequently, the objection to Count Nine has not been preserved for appeal. *See United States v. Bonacorsa*, 528 F.2d 1218, 1222 (2d Cir.), *cert. denied*, 426 U.S. 935 (1976).

The testimony underlying Count Ten, as set out in the indictment, is as follows:

> [False declarations or answers are underlined.]
>
> "Q. Did Reverend Moon carry the check book with him?
>
> A. *He doesn't, because I managed it.*
>
> Q. You carried the check book with you from the very beginning of the account?
>
> A. *Yes, I kept it myself from the beginning.*
>
> Q. Did you sign any of the checks for Reverend Moon's account?

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process by not having it reevaluate all of the perjury counts in light of the court-appointed translator's findings. This claim is meritless; even Kamiyama concedes that the translator's findings generally accorded with the allegedly perjurous language set forth in the indictment. Where there were material variances, for example in Count Twelve, the government did resubmit its case to the grand jury.

A. I never signed it myself, although I asked him for signature, and I made a request, but I never signed myself.

Q. Reverend Moon signed all the checks?

A. That's correct.

Q. And did Reverend Moon write out the other portions of the check other than his signature?

A. *No, no, he didn't do it.*

Q. You prepared all the checks for him?

A. *That's correct.*

* * *

Q. Did Reverend Moon ever write any portion of the checks on the Chase Manhattan account other his signature?

A. *He never wrote anything other than his own signature as far as I remember.*

* * *

Q. So, to your knowledge, he never wrote anything but the signature; is that correct?

A. *To the best of my knowledge, Reverend never affixed anything other than the signature in the book, in the check.*

With respect to the first two allegedly false answers, Kamiyama's objection goes not to the accuracy of the translation, but to the sufficiency of the government's proof at trial. He claims that his answers stated only that Moon does not presently carry the Chase account checkbook; that while the government proved at trial that Moon previously carried the checkbook, it did not prove that he presently does so; and that, therefore, Kamiyama's answers were not shown to be literally false at trial.

We disagree. Viewing the first two answers in sequence and in context, *see Bonacorsa*, 528 F.2d at 1221, they plainly state that Moon "did" not carry the checkbook. This assertion was indisputably proved not to be true at the trial. Kamiyama's remaining contentions regarding Count Ten were either waived or are wholly without merit.

Moving to Count Eleven, the specifications of perjury were as follows:

[False declarations or answers are underlined.]

Q. Now, what was the largest deposit, single deposit that was made into Reverend Moon's account?

A. I think it was around four hundred thousand dollars.

Q. Who deposited that money?

A. I don't remember who I asked to do so. One thing is for sure, I didn't do it myself.

Q. And where did you get the money, that four hundred thousand dollars, to deposit in Reverend Moon's account?

A. *From family fund.*

Q. And where was the money actually at the time before you deposited it into Moon's account?

A. I wasn't physically in charge for that fund. But, I may have asked Miss Tomoko Torii, T-o-m-o-k-o T-o-r-i-i, but without clear recollection.

Q. Well, where did the four hundred thousand dollars—how did you get the four hundred thousand dollars that you deposited into Moon's account?

A. *Over the years, our brethren from Japan, who came to USA, they contribute, and it was accumu-*

lated. I remember that there are at least about seven hundred brethren coming to the USA.

Q. Was any of the money in the family fund ever used to pay expenses for the Japanese members who had come to New York?

A. No. We never did that.

Q. So why didn't you put this money in a bank account?

A. Part of which was put into the bank, and the balance was kept.

Q. Well, did you have a bank account in the name of the family fund?

A. No.

Q. Why did you use Reverend Moon's name for the family fund?

A. *As the money came from overseas*, and part of that money may become necessary as expenses to take care of the brethren, we put it in Reverend Moon's name, who legitimately represents International Unification Church.

Kamiyama argues that the first two answers, although not alleged to be false, were inaccurately translated and somehow cast the third answer in a misleading context. Even assuming inaccuracies with respect to the interpretation of the first two answers, we fail to see any relationship between them and the third answer, the one alleged to be false. With respect to the second allegedly false answer, Kamiyama's claim that it was inaccurately translated is unpersuasive since the version set out in the indictment is in substantial agreement with the appointed translator's version. Kamiyama also argues that the third

allegedly false answer—"As the money came from overseas"—resulted from an inaccurate translation by the interpreter. Comparing this language used in the indictment with the version of the court-appointed translator—"the money from overseas"—we see no material difference.

As for Count Twelve, none of the alleged mistranslations, ambiguities, or other purported infirmities complained of now was raised below. Thus, these claims are waived. Similarly, while he now asserts that the two questions underlying Count Thirteen were translated in a fatally "vague and ambiguous fashion," appellant abandoned his Count Thirteen translation objections during the pretrial hearing on his motion to dismiss. Moreover, there is nothing unduly vague or ambiguous about the Count Thirteen colloquy, which reads as follows in the indictment:

> "Q. Did you ever tell Michael Warder [a lower echelon Unification Church official] to tell government investigators that he got $5000 to purchase stock in Tong Il from relatives or friends? Did you ever tell him to give that explanation to anyone?
>
> A. *I didn't do it.*
>
> Q. Did you ever tell Mike Warder to give a false explanation as to how he paid for his stock in Tong Il?
>
> A. *No, I didn't.*

Appellant further argues with respect to Count Thirteen that the government failed to prove the falsity of his answers. Specifically, he contends that the government demonstrated at trial only that he "suggested" or "recommended" that Warder give a false explanation as to the

Tong Il stock's origin, which is not the same as "telling," and, therefore, that his answers to the grand jury questions were not proven false. Viewing the evidence in the light most favorable to the government, the jury could have concluded that when Kamiyama recommended to Warder that he do something he was telling him to do it. Appellant makes no specific claims with respect to the translation of colloquy underlying count No. 194. Nor does he argue that the government's evidence on that count was insufficient.[10]

Accordingly, the judgments of conviction are affirmed on all counts except Count Seven, on which Kamiyama's conviction is reversed. The mandate of the court shall issue forthwith, provided that the mandate shall be stayed for the purpose of and for so long as is permissible to perfect and determine timely appeals from this decision.

OAKES, *Circuit Judge* (dissenting):

While fully concurring in the other portions of Judge Cardamone's lucid and careful opinion, I am required to dissent to that portion of it relating to the trial judge's charge on the law of trusts. Majority op. IIIA. Contrary to the Government's brief and the majority's view that "Moon did not raise until late in the trial" the claim that

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10 Kamiyama's final contentions regarding his perjury convictions are: (1) that the government breached some obligation on its part to insure at the grand jury level that Kamiyama's erroneous answers were in fact intentional lies rather than mere negligent mistakes; and (2) that his false answers underlying Counts Nine and Ten were immaterial because the grand jury already had in its possession information contradicting his testimony. The district court rejected these arguments in its published decision *see* 532 F. Supp. at 1371-72, 1374, and we agree with that rejection for the reasons stated in the district court's opinion.

he was holding the assets in question in trust, this was his position in the pretrial motion to dismiss as well as during argument on the midtrial motion for a judgment of acquittal. The trial judge quite properly acknowledged his obligation to charge on the law of trusts and did so no fewer than three times in the space of six pages of transcript.[1] The Government's assertion that defendants made "no claim . . . that [they] wanted, much less were entitled to, any of the specific instructions on the law of trusts which are claimed to be so crucial on appeal" simply does not hold water. The Reverend Moon submitted detailed instructions with supporting memoranda of law both on the general issue of beneficial ownership (No. 16) and on the specific issue whether an unincorporated religious association can be the beneficiary of a charitable trust (No. 15). Similarly, counsel pressed and elaborated upon his requests at the charging conference and made plain his disagreement with the proposed instruction submitted by the Government. Furthermore, counsel lodged specific objections to the instructions as given and in doing so specifically renewed the request for proposed instructions. The defense position was clear and consistent throughout the proceedings. *See United States v. Kelinson*, 205 F.2d 600, 601-02 (2d Cir. 1953) (Fed. R. Crim. P. 30 "does not require a lawyer to become a chattering magpie").

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1 For example:

> But I do think you have got to get before the jury the notion that if the jury believes that the people who gave the money intended it to be for the International Unification Church Movement, and if Moon believed he was holding it for that purpose, and if he believed he was using them for that purpose, even though he may have in a few instances made bad investments or used some of it for himself, that the monies could still be viewed as not being his but being the Movement's.

T. 6122.

Even if objections were not properly preserved, however, the issue of beneficial ownership was one "central to the determination of guilt or innocence" in the case, *United States v. Alston*, 551 F.2d 315, 321 (D.C. Cir. 1976). Thus, any defects in respect to the charge on this central issue would constitute plain error and require reversal. *See Connecticut v. Johnson*, 51 U.S.L.W. 4175, 4178 (U.S. Feb. 23, 1983).

Before discussing in detail what I believe were the errors in the trust instructions, I wish to put them in context because it is only then that their importance becomes apparent. In the first place, whether the Chase Manhattan Fund and the Tong Il stock held in Moon's own name were church property or Moon's personal property was the critical issue in the case. The Government went to great lengths to establish a fact that was really conceded from the beginning, that the assets were held in Moon's own name. But the law is clear that dominion and control over funds does not by itself establish taxability, at least where funds are beneficially owned by another. *See, e.g., Brittingham v. Commissioner*, 57 T.C. 91 (1971); *Seven-Up Co. v. Commissioner*, 14 T.C. 965 (1950). *See also Poonian v. United States*, 294 F.2d 74 (9th Cir. 1961). Thus, it was essential that the court's instructions precisely state the law on the creation of a trust relationship and the implications of the jury's finding that such a relationship existed in this case.

In the second place, this case did *not* involve a claim that an ordinary, lay taxpayer held certain assets in a private trust for the benefit of another. On the contrary, the taxpayer here was the founder and leader of a worldwide movement which, regardless of what the observer may think of its views or even its motives, is nevertheless on its face a religious one, the members of which regard

the taxpayer as the embodiment of their faith. Because Moon was the spiritual leader of the church, the issue whether he or the church beneficially owned funds in his name was not as crystal-clear as might seem at first glance to be the case.

It appears that the assets in question came to Moon largely from members of his faith, and there was some evidence that the donors intended their contributions to be used by him for religious purposes. The religious context involved gives the case a special color. As noted in cases such as *Winn v. Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979), funds donated for the use of an individual involved in religious work may be considered gifts to the religious organization with which the individual is affiliated. In *Winn*, for example, it was held that where money was given to the taxpayer's cousin, a missionary, in response to a church-sponsored solicitation, for deposit ultimately to her personal account, and was used, as intended, to support her mission work, it was sufficiently established that the funds were donated "for the use of" the church(es) to permit the contributing taxpayers to claim deductions for contributions. Similarly in *Morey v. Riddell*, 205 F. Supp. 918, 921 (S.D. Cal. 1962), it was held that where money contributed to a totally unorganized religious association by way of checks to individual "ministers" was used to meet expenses of the church, including the ministers' living expenses, deductions for religious contributions would be permitted. *But see Cox v. Commissioner*, 297 F.2d 36 (2d Cir. 1961) (not deductible when intent was to make bequest to individual). The Reverend Moon's claim that he held the Chase Funds and the Tong Il stock as trustee for the Unification Church movement likewise raised the question whether the donors intended this property to be used for religious

purposes. In this context, then, I think it was incumbent upon the court to make certain that the trust charge not only properly state the factual elements that were involved, but that it also clearly emphasize that the Government had the burden of proof beyond a reasonable doubt on this difficult issue.

Moreover, as we are referred to state law in respect to ownership, *see United States v. Mitchell*, 403 U.S. 190, 197 (1971); *United States v. Manny*, 645 F.2d 163, 166 (2d Cir. 1981); *see also* Treas. Reg. § 301.7701-4 (1974), the instructions must be viewed in light of New York law pertaining to assets given to a religious leader for use by the trust. While I by no means agree with the appellants' contention that New York law establishes a presumption that any assets given to a religious leader are held by him in a charitable trust, it at least permits of a finding to this effect.

This conclusion stems from the following facts. First, the law favors charitable trusts and will draw reasonable inferences and resolve ambiguities to find and uphold them. *In re Price's Will*, 264 A.D. 29, 35 N.Y.S.2d 111, 114-15, *aff'd*, 289 N.Y. 751, 46 N.E.2d 354 (1942); *In re Estate of Nurse*, 35 N.Y.2d 381, 389, 362 N.Y.S.2d 441, 446, 321 N.E.2d 537 (1974). *See* N.Y. Est. Powers & Trusts Law § 8-1.1 (McKinney 1967). Second, when a gift appears to have been made for charitable or religious purposes, the gift may be found to have been made in trust even if no trust language has been used and even if the gift was in form absolute. *In re Durbrow's Estate*, 245 N.Y. 469, 477, 157 N.E. 747, 749 (1927); *see also New York City Mission Society v. Board of Pensions*, 261 A.D. 823, 823, 24 N.Y.S.2d 395, 396 (1941). Third, there are numerous cases holding that a minister or other church official who held title to property in his own name

did so as trustee for the church. *See, e.g., Sears v. Parker*, 193 Mass. 551, 79 N.E. 772 (1907) (fund for widows and orphans of church ministers); *Jones v. Habersham*, 107 U.S. 174, 182 (1882) (devise to church trustees to benefit of poor and feeble churches in state). *See* 4 A. Scott, *The Law of Trusts* §§ 371.3, at 2885 & n.4, 351 at 2797-98 (3d ed. 1967). Finally, where the source of the assets is a church source, added to the fact that the donee is a religious official, a trust may be imposed. *See Fink v. Umscheid*, 340 Kan. 271, 19 P. 623 (1888) (Catholic bishop using money supplied by congregation to purchase land in his own name for a church and school, later attempting to sell property; land concededly held in trust). *See also Archbishop v. Shipman*, 79 Cal. 288, 21 P. 830 (1889). Thus the key issue was whether the funds were given to Moon for his own use or for that of his international church movement, and whether, even though some of the funds were utilized for his own living purposes, the donors intended to permit such use.[2]

I reprint in the margin[3] the instructions on the "key issue" or the "central question" as the judge in his

2 I note here that Moon was indicted, and the case was tried, on the theory that the funds were never in trust to begin with, and not on the theory that he had "diverted" to his own use funds originally given in trust.

3 The key issue is whether or not the bank accounts at the Chase Manhattan Bank and the Tong Il stock issued in Reverend Moon's name belonged to Reverend Moon.

The defense contends that these funds and stock were beneficially owned by the International Unification Church Movement which supported the activities of the various national church entities in the United States and elsewhere.

The government contends that these funds belong to Reverend Moon.

This is the crucial issue of fact for you to decide.

If you find that the funds in the Chase accounts were the property of International Unification Church Movement or were held in trust by Moon for the International Unification Church

instructions to the jury termed it. The ensuing discussion relates to this material. In my view those instructions

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Movement and used for church purposes and that the interest on those funds also belonged to the International Unification Church Movement and were used for it, then that interest would not be taxable income to Moon. You should not consider whether that interest income would be taxable to anyone other than Moon; that is, you should not concern yourself with whether the International Unification Church Movement had any tax liability for the interest earned by the time deposits, because that is not an issue in this case.

In determining whether in 1973, 1974 and 1975 the International Unification Church Movement existed and whether the Movement owned the funds in the Chase accounts and Tong Il stock or whether Reverend Moon owned them, you should consider all the evidence, including such factors whether the Movement had a specific organizational s[illegible]cture, written charter or constitution, the existence of other Unification Church corporate entities during the relevant time period, the fact that the accounts were maintained under Reverend Moon's name, the source of the funds, the intent of the parties who caused the stock and funds to be transferred to Reverend Moon's name, evidence of any agreements as to how the funds would be used, the manner in which the stock and funds were administered and whether there is any evidence Moon ever accounted to anyone for the use of the funds.

This list is by no means exhausted. You should consider all the evidence in making your determination.

In consider[ing] the evidence, there are a number of related issues which may occur to you. I want to briefly instruct you on the law applicable to these issues.

As I have mentioned, you may consider whether the International Unification Church Movement had a specific organizational structure in making your decision. However, the lack of a formal corporation does not prevent a religious movement from being the beneficial owner of property held in the name of another.

Now, the defendants contend, among other things, that Moon held the Tong Il stock and the funds of the Chase accounts as trustee for the International Unification Church Movement. Let me briefly explain to you the essentials of a trust in order for you to evaluate these contentions.

A trust is created when a person is given money or property to be held and used for the benefit of someone else. The person holding the property is called the trustee.

The person who transfers the property to the trust is referred to as a "settler"; the person who holds the property is the "trustee"; and the person or entity on whose behalf it is held is the "beneficiary."

Whether a trust is created depends on the intent of the person giving the property at the time of the transfer, and that intent must

contained errors which, because they were on the crucial issue of the case, must be considered prejudicial.

First, in referring to the fact that the jury should consider all the evidence on the issue whether the Unification Church movement existed and whether the move-

be clear and unambiguous. A trust can be created orally or by the conduct of the parties. The trust need not be reflected in a written document.

In order for a trust to exist, the trustee must be obligated to use the property for the benefit of the beneficiaries; a gift with a mere request or expectation that the property would be used a particular way does not create a trust. There is no trust if the person who receives the money is free to use it for his own benefit. If a trust does exist and the trustee diverts trust property to his own use, the funds diverted become taxable to him at the time and to the extent so diverted.

In determining whether a trust relationship existed, you should, as I have already mentioned, consider all the evidence before you.

It is unnecessary for there to be a written agreement between Reverend Moon and the International Unification Church, providing he held the time deposits and the Tong Il stock on behalf of the church. All that is required is that both parties to the relationship understand that the first person is holding the property for the benefit of the second, and you can find such an understanding on the basis of the party's conduct.

Also the mere fact that Reverend Moon exercised control over the funds and the stock is not necessarily indicative of his personal ownership. A person who holds property on behalf of another may be given broad authority and discretion to deal with that property as long as he does so in a manner consistent with the purpose for which he was given title to the property in the first place.

I would like to say a few final words on the subject of religious movements.

Such organizations can invest and conduct businesses. While the income from such businesses is taxable, this fact does not make taxable the religion's income from other sources, including interest it earns on funds it has on deposit.

There is no legal requirement that a religious society be incorporated prior to making business investments. It is legal for an unincorporated church or religious association to be the beneficial owner of property held for its use in the name of others.

A religious organization can properly pay the living expenses of [its] leaders or ministers in order to allow them to pursue its religious purposes and can make loans to its ministers or leaders on arm's length terms.

T. 6583-88.

ment or the Reverend Moon owned the funds in the Chase accounts and Tong Il stock, the court listed eight factors as set forth in Paragraph Six of the footnote. Listed among these, but not emphasized, was "the intent of the parties who caused the stock and funds to be transferred to Reverend Moon's name." Rather than simply including intent as one of the things for the jury to consider, the court in my view should have advised the jury to accord the greatest weight to this factor. The church source of the funds and Moon's role as church leader were likely to cast light on the issue of the donors' intent, and accordingly the charge should have specifically directed the jury's attention to them. The instruction as given allowed the jury to find against Moon on the issue of beneficial ownership without even considering the crucial issue of donors' intent. *See Sandstrom v. Montana*, 442 U.S. 510 (1979).

Secondly, though the issue was whether funds were given to a religious trust, the charge was that the intent to create it must be "clear and unambiguous," as in the case of private trusts. I recognize that the majority believes this portion of the charge to be correct under New York law, but the cases it cites for that proposition do not support it. *County of Suffolk v. Greater New York Councils, Boy Scouts of America*, 51 N.Y.2d 830, 832-33, 433 N.Y.S.2d 424, 425, 413 N.E.2d 363, 364 (1980), dealt only with the issue when a donation to a charitable organization, concededly subject to charitable trust restrictions, will be subject to additional specialized restrictions on use narrower than the organization's general charitable purpose; the court reversed a holding that a bequest to the Queens County Council of the Boy Scouts had to be used forever for a particular Boy Scout camp as distinct from the Boy Scouts generally. *Lefkowitz v.*

Cornell University, 35 A.D.2d 166, 173, 316 N.Y.S.2d 264, 271 (1970), *aff'd*, 28 N.Y.2d 876, 322 N.Y.S.2d 717 (1971), held that a trust was not created by the donee's actions. Relying upon *In re Fontanella*, 33 A.D.2d 29, 30, 304 N.Y.S.2d 829, 831 (1969), the court held that the evidence was insufficient to show that the donee ever intended to create a trust. *Fontanella* simply involved a private trust, not a religious trust, and the donee was not the leader of a religious group.[4]

Thus, there appears to be no good basis for finding that "clear and unambiguous" intent is necessary to create a charitable trust under the law of New York. The strong policy of New York trust law and of trust law generally is to uphold charitable trusts whenever possible and to construe their terms liberally. *See, e.g., In re Price's Will*, 264 A.D. at 29, 35 N.Y.S.2d at 111; *In re Durbrow's Estate*, 245 N.Y. at 469, 157 N.E. at 747. In light of this fact, it is anomalous to require "clear and

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4 The majority is equivocal in saying, on the one hand, that the only burden on Moon was to present a prima facie case that he held the assets in trust, and not to establish this as an affirmative defense and, on the other, that a review of the evidence reveals no proof that Moon actually held the subject funds in trust. The majority states that "the only evidence presented was the testimony of three church members who simply stated that they gave money to Moon intending to donate it to their church. Nothing was said about creation of a trust." This statement runs contrary to the New York and other trust law I have cited above. It was not necessary that the creation of a trust be mentioned. *See* N.Y. Est. Powers & Trusts Law § 8-1.1 (McKinney 1967); Restatement (Second) of Trusts § 351 comment b (1959) ("No particular form of words or conduct is necessary for the manifestation of intention to create a charitable trust. Compare, as to private trusts, § 24(2). A charitable trust may be created although the settlor does not use the word 'trust' or 'trustee.' ").

In this connection the trial court and I agree. There was evidence sufficient, though by no means conclusive, to present the question to the jury. The majority and I agree that, if this were the case, the burden of proof beyond a reasonable doubt remained upon the Government. But the majority thinks there was not enough evidence to present the issue to the jury at all.

unambiguous" proof of the donor's intent to establish a charitable trust.

The second crucial error in the instructions lies in the charge that the jury should consider as the very first factor whether the International Unification Church movement "had a specific organizational structure, written charter or constitution . . . ." (*See supra* note 3, ¶ 3.) The Government concedes that it is a cardinal rule of trust law that a charitable trust cannot fail for lack of a specific beneficiary. The court should have said that a specific organizational structure was *not* a prerequisite to the existence of a charitable trust because in fact no beneficiary of a charitable trust need be designated at all. *See* N.Y. Est. Powers & Trust Law § 8-1.1 (McKinney 1967).[5] *See* 4 A. Scott, *The Law of Trusts* § 364, at 2838-39 (3d ed. 1967).

Moreover, the court's instructions regarding the use or misuse of trust funds were at the very least confusing. (*See supra* note 3, ¶ 14.) First, while it may be correct as a matter of law that a trustee who diverts trust property to his own use is taxable to the extent of the diversion, diversion was not charged in the indictment. Thus, evidence of diversion was irrelevant to the case. The diversion instruction, given over defense objection, was at variance with the theory on which the Reverend Moon was indicted and on which the entire case was tried.

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5 N.Y. Est. Powers & Trusts Law § 8-1.1(a) (McKinney 1967) reads as follows:

> No disposition of property for religious, charitable, educational or benevolent purposes, otherwise valid under the laws of this state, is invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries. If a trustee is named in the disposing instrument, legal title to the property transferred for such a purpose vests in such trustee; if no person is named as trustee, title vests in the court having jurisdiction over the trust.

Second, a trust may exist even though the trustee is endowed with the freedom to use for his own personal benefit a portion of the funds he holds in trust and such use will not nullify the existence of the trust. *United States v. Scott*, 660 F.2d 1145, 1166 n.38 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Rev. Rul. 71-449, 1971-2 C.B. 77. This is particularly true in the case of monies held in trust by religious leaders, since often use of such funds to pay a leader's living expenses are within the scope of the church's religious purposes. *See, e.g., Morey v. Riddell*, 205 F. Supp. at 918. Moreover, the instruction failed to explain that, even if the Reverend Moon had improperly diverted some of the Chase funds to a nontrust use, such partial diversion could not make the entire corpus, and thus the interest thereon, taxable to him. *United States v. Scott*, 660 F.2d at 1145; *see also Herbert v. Commissioner*, 377 F.2d 65 (9th Cir. 1967). The inclusion of the phrase "to the extent so diverted" in the diversion portion of the charge could not have conveyed this concept at all.

Finally, in my view the instructions shifted to the defendant the burden of proof on the issue of beneficial ownership. The jury was charged that "if" it found the Chase funds were the property of the International Unification Church movement or were held in trust by Moon for the movement, "then" the interest "would not be taxable income to Moon." The implication of this instruction was that Moon had to convince the jury that the property belonged to the movement. *See Notaro v. United States*, 363 F.2d 169, 175-76 (9th Cir. 1966) (condemning an "if/then" instruction as obscuring the locus of the burden of proof). By saying that the donor's intent must be "clear and unambiguous," not only was the law of charitable trusts being misstated, but the burden of

proof improperly placed upon the defendant was made heavy indeed. I do not believe that the mention of "beyond a reasonable doubt" at the tail end of this discussion overcame the improper language within the curative concept of *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

Thus in a case where the crucial issue, and indeed the only real factual question, was whether property unquestionably held in Moon's own name was beneficially owned by him personally or was held by him on behalf of his international church movement, the charge fell short in several respects.

While often a charge is simply a way to achieve rough justice with the help of a jury, when a critical issue separating criminal conduct from civil is involved, in my view it must be accurate in *all* respects. This charge, I believe, was not.